A TREATISE

ON

HINDU LAW

BY

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HINDU LAW

CHAPTER I.

INTRODUCTORY.

ORIGINAL TEXTS.

N.B.—*The words in Italics are not in the original texts, but are explanatory additions.*

१। अहं प्रजाः सिसृक्षुस्तु तपस्तप्त्वा सुदुश्चरम्।
पतीन् प्रजानाम् असृजम् महर्षीन् आदितो दश
मरीचिम् अत्र्यङ्गिरसौ पुलस्त्यं पुलहं क्रतुम्।
प्रचेतसं वशिष्ठञ्च भृगुं नारदम् एव च॥
इदं शास्त्रन्तु कृत्वासौ माम् एव स्वयम् आदितः।
विधिवद्-ग्राहयामास मरीच्यादींस्वहं मुनीन्॥
एतद् वोऽयं भृगुः शास्त्रं श्रावयिष्यत्यशेषतः।
एतद्धि मत्तोऽधिजगे सर्व्वम् एषोऽखिलं मुनिः॥

मनुः। १। ३४, ३५, ५८, ५९॥

1. Being desirous of creating beings, I *Manu* performed very difficult religious austerities, and at first created ten Lords of beings, who were great Rishis *or sages eminent in holiness*, namely, Maríchi, Atri, Angirás, Pulastya, Pulaha, Kratu, Prachetás, Vasishtha, Bhrigu and Nárada. (Manu, i, 34-35.) He *the self-existent* having made this Shástra *i.e., Code of Manu*, himself taught it regularly to me *Manu* in the beginning: afterwards I taught Maríchi and the other holy sages. This Bhrigu will repeat to you this Shástra without omission; for, this sage learned from me the whole of it, perfectly well.—Manu, i, 58-59.

२। वेदः स्मृतिः सदाचारः स्वस्य च प्रियम् आत्मनः।
एतच्-चतुर्विधं प्राहुः साक्षाद्-धर्मस्य लक्षणम्॥

मनुः। २। १२॥

2. The Veda, the Smriti, the approved usage, and what is agreeable to one's soul *or good conscience, where there is no other guide*, the

wise have declared to be the quadruple direct evidence of Dharma *or law and other means of securing good.*—Manu, ii, 12.

३ । श्रुतिः स्मृतिः सदाचारः स्वस्य च प्रियम् आत्मनः ।
सम्यक् सङ्कल्पजः कामो धर्ममूलम् इदं स्मृतम् ॥

याज्ञवल्क्यः— १ । ७ ॥

3. The Sruti, the Smriti, the approved usage, what is agreeable to one's soul *or good conscience* and desire sprung from due deliberation, are ordained the foundation *or evidence* of Dharma.—Yájnavalkya, i, 7.

४ । पुराण-न्याय-मीमांसा धर्मशास्त्राङ्गमिश्रिताः ।
वेदाः स्थानानि विद्यानां धर्मस्य च चतुर्दश ॥

याज्ञवल्क्यः—१ । ३ ॥

4. The *four* Vedas, together with their *six* Angas *or subsidiary sciences*, the Dharma-shástras *or Codes of Law*, the Mimánsá *or disquisition* of the rules of scripture, the Nyáya *or science of reasoning or rules of interpretation*, and the Puránas *or records of antiquity*, are the fourteen sources of knowledge and Dharma.—Yájnavalkya, i, 3.

५ । द्वे विद्ये वेदितव्ये, इति ह स्म यद्-ब्रह्मविदो वदन्ति, परा चैवापरा च ॥

तत्र अपरा,—ऋग्वेदो यजुर्वेदः सामवेदोऽथर्ववेदः, शिक्षा कल्पो व्याकरणं निरुक्तं छन्दो ज्योतिषम् इति ॥

अथ परा—यया तद्-अक्षरम् अधिगम्यते । यत् तद् अदृश्यम् अग्राह्यम् अगोत्रम् अवर्णम्, अचक्षुःश्रोत्रं तद्-अपाणिपादम् । नित्यं विभुं सर्वगतं सुसूक्ष्मं, तद्-अव्ययं यद् भूतयोनिं परिपश्यन्ति धीराः । यथोर्णनाभिः सृजते गृह्णते च, यथा पृथिव्याम् ओषधयः संभवन्ति । यथा सतः पुरुषात् केशलोमानि, तथाऽक्षरात् संभवतीह विश्वम् ॥

मण्डूकोपनिषद्, १ । १ । ४ ७ ॥

5. Two sciences should be known—this is what was said by those who knew the Revelations:—the Ultimate and the Non-Ultimate.

Of these, the Non-Ultimate consists of the *four* Vedas, namely, the Rik, the Yajus, the Sáman and the Atharvan, and *of the six Angas, namely*, the Sikshá *or the science of proper articulation and pronunciation=Othography and Orthoepy*, the Kalpa *or the regulation of the manner of performing sacrifices*, Vyákarana *or grammar*, the Nirukta *or thesaurus, with explanation of the etymology of words*, the Chhandas *or prosody* and the Jyotisha *or astronomy*.

And the Ultimate is the science *embodied in the Upanishads* by which is known the Imperishable, *i.e.*, that which is imperceptible *to the organs of sense* intangible *by the organs of action*, not sprung from any parent, destitute of any quality *or colour*, having neither eyes nor ears, which has no hands nor feet, which is eternal, omnipresent, all-pervading, extremely subtile, undecaying *and* cause of all beings,—that which the wise perceive everywhere: as the spider spreads out and draws in *the thread*, as the annuals grow up in the earth, and as the hairs long and short *grow* from *the body of* a living person, so every thing here comes into being from the Imperishable.—Mundaka-Upanishad, i, i, 4-7.

६ । चोदनालक्षणः अर्थः धर्मः । २ ॥

तस्य निमित्त-परीष्टिः । ३ ॥

सत्संप्रयोगे पुरुषस्य इन्द्रियाणां बुद्धिजन्म, तत् प्रत्यक्षम्, अनिमित्तं, विद्यमानोपलम्भनत्वात् । ४ ॥

औत्पत्तिकस्तु शब्दस्य अर्थेन सम्बन्धः, तस्य ज्ञानम् उपदेशः, अव्यतिरेकश्च, अर्थे अनुपलब्धे तत् प्रमाणं, बादरायणस्य, अनपेक्षत्वात् ॥५॥

जैमिनिः १ । १ । २-५ ॥

6. Dharma is a *means of securing a desirable* purpose *or end i.e., happiness uncontaminated with pain* of which the Vedic injunction *or precept* is the *only* proof *or source of knowledge.*—2.

An examination *or establishment by reasoning* of the means *of knowledge* of Dharma, *is made in the following aphorisms, that is to say, the proposition that the Vedic precept is the only means of knowing Dharma is established by reasoning in the next two aphorisms.*—3.

The intellection *or knowledge* that arises on the requisite perfect union of a person's senses with existing objects is *called* perception; that *i.e., perception* is not the means *of knowing Dharma*, by reason of *its* causing knowledge of existing things *only, and therefore Dharma which is not in existence at the time of knowledge derived from Vedic precepts, cannot be proved by, or known from, perception; hence, Dharma is also beyond the scope of Inference founded, as it is, on the Perception of existing facts.*—4.

But the connection of a word with *its* meaning is eternal *or natural not artificial, i.e., not made by man*; the instruction *or precept by the Vedic words* is the *only* means of knowledge of that, *i.e., Dharma*, and is not *otherwise proved* erroneous; *hence* as regards the meaning *conveyed by the Vedic instruction* which is not known *by means of any other proof save that of the words*, the same *i.e., the instruction* is proof *or the only means of knowing the truth of what is conveyed by the words*, because it is not dependent *on any other proof, i.e., the intellection caused by the hearing or perusal of the Vedic words is self-evident,*

that is to say, it does not require any other proof to establish its existence : –This is the opinion of Vyása also."—5.—Jaimini, 1, 1, 2—5.

७ । मन्वत्रिविष्णुहारीतयाज्ञवल्क्योशनोऽङ्गिराः ।
यमापस्तम्बसम्वर्त्ताः कात्यायनबृहस्पती ॥
पराशर-व्यास शङ्ख-लिखिता दक्षगौतमौ ।
शातातपो वशिष्ठश्च धर्म्मशास्त्रप्रयोजकाः ॥

याज्ञवल्क्याः—१ । ४-५ ।

नेयं परिसंख्या किन्तु प्रदर्शनार्थं, अतो बौधायनादेरपि धर्म्मशास्त्रत्वम् अविरुद्धम् । इति मिताक्षरा ।

7. Manu, Atri, Vishnu, Hárita, Yájnavalkya, Usanás, Angiras, Yama, A'pastamba, Sambarta, Kátyáyana, Vrihaspati, Parásara, Vyása, Sankha, Likhita, Daksha, Gautama, Sátátapa and Vasishtha, are the compilers of the Dharma-sástras *or Codes of Law.*—Yájnavalkya, i, 4-5.

The Mitákshará on this passage says:—This is not an exhaustive enumeration, but illustrative; hence, the compilations of Baudháyana *Nárada, Devala* and others being Dharma-sástras, is not contrary to it.

८ । धर्म्मस्य शब्दमूलत्वाद् अशब्दम् अनपेक्षं स्यात् ॥ १ ॥
अपि वा कर्त्तृसामान्यात् प्रमाणम् अनुमानं स्यात् । २ ॥
विरोधे त्वनपेक्षं स्यात् असति ह्यनुमानं । ३ ॥
हेतुदर्शनाच्च । ४ ॥ जैमिनिः, १ । ३ । १-४ ॥

8. *It may be contended that* as the words of Revelation form the foundation of Law, therefore that *such as the Smriti* which is not embodied in such words should not be regarded as authority.—1.

But *the answer is*, the Smritis being compiled by the sages who were also the repositories of the Revelation *from whom it was handed down by tradition until recorded in writing*, there arises an inference that the Smritis are founded on the Sruti or Revelation, and therefore *they should be regarded as* authority.—2.

But if there be conflict *of any precept of the Smriti with one of the Sruti*; the Smriti must be disregarded *as spurious ;* since the inference arises, *only* when there is no such conflict.—3.

A Smriti must be disregarded as spurious, also, when there is found a reason *for fabricating it, such as the covetousness of priests, or the like.* —4.—Jaimini's Purva-Mimánsá, i, 3, 1-4.

The argument in the second of the above aphorisms is explained in the following sloka cited and commented on by Pártha-Sárathi in his Shástra-Dípiká,—

वैदिकैः स्मर्य्यमानत्वात् तत्परिग्रहदार्ढ्यतः ।
संभाव्यवेदमूलत्वात् स्मृतीनां वेदमूलता ॥

Revelation is *inferred to be* the source of the Smritis, because they are remembered *and compiled* by those who admit the Veda alone *and nothing else* to be the source of law, and because they have been adopted and acted upon as authoritative by such persons, and because their being founded on the Veda is probable.

९ । सरस्वती-दृषद्वत्योर्देवनद्यो-र्यद् अन्तरम् ।
तं देवनिर्म्मितं देशं ब्रह्मावर्त्तं प्रचक्षते ॥
तस्मिन् देशे य आचारः पारम्पर्य्य-क्रमागतः ॥
वर्णानां सान्तरालानां स सदाचार उच्यते ॥

मनुः—२ । १७-१८ ॥

9. The holy country lying between the holy rivers Sarasvatí and Drishadvatí is called Brahmávarta: the custom in that country, which has come down by immemorial tradition and obtains among the castes pure and mixed, is called approved usage.—Manu, ii, 17-18.

१० । कुरुक्षेत्रञ्च मत्स्याश्च पञ्चालाः शूरसेनकाः ।
एष ब्रह्मर्षिदेशो वै ब्रह्मावर्त्तादनन्तरः ॥
एतद्देशप्रसूतस्य सकाशादग्रजन्मनः ।
स्वं स्वं चरित्रं शिक्षेरन् पृथिव्यां सर्व्वमानवाः ॥
हिमवद्-विन्ध्ययोर्मध्यं यत् प्राग्विनशनादपि ।
प्रत्यगेव प्रयागाच्च मध्यदेशः प्रकीर्त्तितः ॥
आसमुद्रात्तु वै पूर्व्वात्, आसमुद्रात्तु पश्चिमात् ।
तयोरेवान्तरं गिर्य्योर्-आर्य्यावर्त्तं विदुर्बुधाः ॥
कृष्णसारस्तु चरति मृगो यत्र स्वभावतः ।
स ज्ञेयो यज्ञियो देशो म्लेच्छदेशस्ततः परः ॥
एतान् द्विजातयो देशान् संश्रयेरन् प्रयत्नतः ।
शूद्रस्तु यस्मिन् कस्मिन् वा निवसेद् वृत्तिकर्षितः ॥

मनुः, २ । १९-२४ ॥

10. Next *in holiness or position* to Brahmávarta is the country called Brahmarshi consisting of Kurukshetra, Matsyá Panchálá and Súrasená. From a Bráhmana born in this country all men on earth should learn their respective usages. The country lying between the Himavat and the Vindhya *mountains* and to the east of Vinasana *the place where the Sarasvatí disappears* and to the west of Prayága *i.e., Allahabad* is called Madhya-desa *or the middle country.* The country *extending* to the eastern, and to the western oceans and *lying* between these very mountains the wise call Aryávarta. Where the black antelope lives naturally, that is known as the sacrificial country; beyond the same is the country of the Mlechchhas. These countries, the twice-born persons should take care to dwell in *if born elsewhere*; but a Súdra may live anywhere, for the sake of maintenance.—Manu, ii, 19-24.

११ । दक्षिणेन हिमवतः उत्तरेण विन्ध्यस्य ये धर्म्माः, ये चाचाराः, ते सर्वे प्रत्येतव्याः, न त्वन्ये प्रतिलोमकल्पधर्माः । एतद्-आर्य्यावर्त्तम् इत्याचक्षते । गङ्गायमुनयोरन्तराप्येके, यावद् वा कृष्णमृगो विचरति तावद् ब्रह्मवर्चस्-मिति ॥ वशिष्ठः । प्रथमाध्याये ॥

11. "Those laws and those usages that are *observed in the country* on the south of the Himavat and on the north of the Vindhya, all those ought to be followed: but not the laws prevailing among the Mlechchhas, that are different *from these.* This country *between Himavat and Vindhya* is called A'ryávarta; some say *this country is limited to that which lies* between the Ganges and the Yamuná, or *extends* so far as the black antelope roams, where spiritual pre-eminence *obtains.*—Vasishtha, Ch. 1.

१२ । यस्मिन् देशे य आचारो व्यवहारः कुलस्थितिः ।
तथैव परिपाल्योऽसौ यदा वशम् उपागतः ॥

याज्ञवल्क्यः—१ । ३४३ ॥

12. Whatever customs, practices and family usages prevail in a country, shall be preserved intact, when it comes under subjection by (conquest).—Yájnavalkya, i, 343.

१३ । यस्मिन् देशे य आचारो न्यायदृष्टस्तु कल्पितः ।
स तस्मिन्नेव कर्त्तव्यो न तु देशान्तरे स्थितः ॥
यस्मिन् देशे पुरे ग्रामे चैविद्ये नगरेऽपि वा ।
यो यत्र विहितो धर्म्म-स्तं धर्मं न विचालयेत् ॥

देवलः पराशरमाधव-धृतः ॥

13. But if any usage required by utility is established in a locality *contrary to the written texts of law*, it should be practised therein only, but not in any other district. Whatever customary law is prevalent in a district, in a city, in a town, or in a village, or among the learned, the said law *though contrary to the Smritis* must not be disturbed.—Devala, cited in the Parásara-Mádhava.

१४ । सर्व्वेषाम् एवमादीनां प्रतिदेशं व्यवस्थया ।
आपस्तम्बेन संकृत्य दुष्टादुष्टत्वम् आश्रितं ।
येषां परम्पराप्राप्ताः पूर्व्वजैरप्यनुष्ठिताः ।
त एव तैर्न दुष्येयु-राचारैर्नेतरे पुनः ॥

कुमारिलस्वामिनेदं परमतमित्युपन्यस्तं तन्त्रवार्त्तिके प्रथमाध्याये तृतीयपादे ॥

14. A'pastamba has briefly explained the reprehensibility or non-reprehensibility of all such usages *as are contrary to the written texts of law* by referring them to different localities. By these usages they do not become liable to censure, who have got them by tradition, and whose predecessors used to practise them; others, however, are not so, *but become guilty of violating the written texts of law, if they practise those usages.*

This is stated as the opinion of others, by Kumárila Swámin who himself maintains the invalidity of such usages, in his Tantra-Vártika, first Chapter, third Páda or Section.

१५ । अष्टादशपुराणानि पुराणज्ञाः प्रचक्षते ।
ब्राह्मं पाद्मं वैष्णवञ्च शैवं भागवतं तथा ॥
अथान्यं नारदीयञ्च मार्कण्डेयञ्च सप्तमम् ।
आग्नेयम् अष्टमञ्चैव भविष्यं नवमं तथा ॥
दशमं ब्रह्मवैवर्त्तं लैङ्गम् एकादशं स्मृतम् ।
वाराहं द्वादशञ्चैव स्कान्दञ्चात्र त्रयोदशम् ॥
चतुर्दशं वामनञ्च कौर्म्मं पञ्चदशं स्मृतम् ।
मात्स्यञ्च गारुड़ञ्चैव ब्रह्माण्डञ्च ततः परम् ॥
सर्गश्च प्रतिसर्गश्च वंशो मन्वन्तराणि च ।
सर्व्वेष्वेतेषु कथ्यन्ते वंशानुचरितञ्च यत् ॥

विष्णुपुराणं, ३।६।२१-२५ ॥

15. Eighteen *Puránas* are enumerated by those versed in the *Puránas*:—the Bráhma, the Pádma, and the Vaishnava, the Saiva, Bhága-

vata, likewise, another is the Náradíya, and the Márkandeya is the seventh, and the A'gneya is the eighth, likewise the Bhavishya is the ninth, the tenth is the Brahma-vaivarta, the Lainga is ordained the eleventh, and the Váráha is the twelfth, and the Skánda is the thirteenth, in this *enumeration* the Vámana is the fourteenth, the Kaurma is ordained the fifteenth, posterior to these are the Mátsya, and the Gáruda and the Brahmánda: In all these the subjects dealt with are, the creation, the secondary creation, the dynasties *of gods, sages and kings* the ages of the world, as well as the career of the dynasties.—Vishnu-Purána, iii, vi, 21-25.

१६ । श्रुतेर्द्वैधे स्मृतेर्द्वैधे स्थलभेदः प्रकल्प्यते ।
श्रुतिस्मृतिविरोधे तु श्रुतिरेव गरीयसी ॥

16. In case there be two contradictory precepts of the Sruti or of the Smriti, they are reconciled thus,—different cases are to be assumed *to which they are respectively applicable*: but if there be a conflict between *a text of* the Sruti and *one of* the Smriti, the Sruti alone must prevail.

१७ । स्मृत्योर्विरोधे न्यायस्तु बलवान् व्यवहारतः ।
अर्थशास्त्रात् तु बलवत् धर्मशास्त्रम् इति स्थितिः ॥

याज्ञवल्क्यः—२ । २१ ॥

17. But in a case of conflict between two passages of the Smriti, reconciliation based on usage must prevail: but the rule is, that the sacred books on law are more weighty than sacred books on politics.—Yájnavalkya, ii, 21.

१८ । श्रुतिस्मृतिपुराणानां विरोधो यत्र दृश्यते ।
तत्र श्रौतं प्रमाणन्तु तयोर्द्वैधे स्मृतिर्वरा ॥

व्याससंहिता ॥

18. When there is a conflict between the Sruti, the Smriti and the Purána, the Sruti must prevail: but in a conflict between the latter two, the Smriti must prevail.—The Code of Vyása.

१९ । कायेन मनसा वाचा यत्नाद् धर्मं समाचरेत् ।
अस्वर्ग्यं लोकविद्विष्टं धर्म्यम् अप्याचरेन् न तु ॥

याज्ञवल्क्यः—१ । १५६ ॥

19. Practise with care what is lawful, by body, mind and speech; but practise not that which is abhorred by the world, though it is ordained in the Sacred Books; for, it secures not spiritual bliss.—Yájnavalkya, i, 156.

२०। अस्वर्ग्यं लोकविद्विष्टं धर्म्यम् अप्याचरेन् न तु ॥
समुद्र-यात्रा-स्वीकारः कमण्डलु-विधारणम् ।
द्विजानाम् असवर्णासु कन्यासूपयमस्तथा ॥
दैवरेण सुतोत्पत्तिर्मधुपर्के पशोर्वधः ।
मांसदानं तथा श्राद्धे वानप्रस्थाश्रमस्तथा ॥
दत्ताक्षतायाः कन्यायाः पुनर्दानं परस्य च ।
दीर्घकालं ब्रह्मचर्य्यं नरमेधाश्वमेधकौ ॥
महाप्रस्थानगमनं गोमेधश्च तथा मखम् ।
इमान् धर्म्मान् कलियुगे वर्ज्यान् आहुर्मनीषिणः ॥

बृहन्नारदीयम्—२२। १२-१६ ॥

20. But practise not what is abhorred by the people, though it is ordained in the sacred books; for, it secures not spiritual bliss. Taking sea-voyage; carrying a waterpot *by students;* likewise marriage by regenerate men, of damsels not belonging to the same tribe; procreation of son *on a woman* by her husband's younger brother; slaughter of cattle for entertaining honoured guests; offering of flesh meat in ancestor-worship; retirement to a forest *or adoption of the third order of life;* gift over again of a daughter once given in marriage though still a virgin to another *bridegroom;* study of the Vedas for a long time; man-sacrifice; horse-sacrifice; ceaseless walking with intent to die; and likewise cow-sacrifice;—these practices though permitted by the sacred books, the wise declare avoidable in the Kali age.—Vrihan-Náradíya-Puráṇa, xxii, 12-16.

२१। दत्तौरसेतरेषान्तु पुत्रत्वेन परिग्रहः ।
शूद्रेषु दास-गोपाल-कुलमित्रार्द्धसीरिणां ।
भोज्यान्नता, गृहस्थस्य तीर्थसेवातिदूरतः ।
ब्राह्मणादिषु शूद्रस्य पक्वतादिक्रियापि च ।
भृग्वग्निमरणञ्चैव हृदादिमरणं तथा ।
इमानि लोकगुप्त्यर्थं कलेरादौ महात्मभिः ।
निवर्त्तितानि कर्म्माणि व्यवस्थापूर्व्वकं बुधैः ।
समयश्चापि साधूनां प्रमाणं वेदवद्-भवेत् ॥

आदित्यपुराणवचनम् ॥

21. Recognition of sons other than the Aurasa and the Dattaka; participation *by a Bráhmana* of food from the following descriptions of Súdras, namely, *his* slave, *his* cowherd, *his* family-friend, and the cultivator *of his land* delivering half the produce; pilgrimage by a householder to a very distant holy place; participation by the Bráhmanas and the like, of food prepared by a Súdra; suicide by falling from a precipice or by cremation; likewise suicide by a person extremely old or the like:—In the beginning of the Kali age, these practices have been prohibited after consideration by the learned for the protection of the people: for, a convention also, made by the virtuous, has as much authority as the Veda.—A'ditya Puráṇa quoted by Raghunandana.

२२। तत्रासीनः स्थितो वापि पाणिम् उद्यम्य दक्षिणम्।
विनीतवेषाभरणः पश्येत् कार्याणि कार्थिनाम् ॥ २ ।
प्रत्यहं देशदृष्टैश्च शास्त्रदृष्टैश्च हेतुभिः।
अष्टादशसु मार्गेषु निबद्धानि पृथक् पृथक् ॥ ३ ।
तेषाम् आद्यम् ऋणादानं, निक्षेपो-ऽस्वामिविक्रयः।
सम्भूय च समुत्थानं दत्तस्यानपकर्म च ॥ ४ ।
वेतनस्यैव चादानं संविदश्च व्यतिक्रमः।
क्रयविक्रयानुशयो विवादः स्वामि-पालयोः ॥ ५ ।
सीमाविवादधर्मश्च पारुष्ये दण्डवाचिके।
स्तेयञ्च साहसञ्चैव स्त्रीसंग्रहणमेव च ॥ ६ ।
स्त्रीपुंधर्मौ विभागश्च द्यूतम् आह्वय एव च।
पदान्यष्टादशैतानि व्यवहारस्थितौ विदुः ॥ ७ ॥

मनुः ८। २-७ ॥

22. In his Court of Justice, either sitting or standing, holding forth his right arm, unostentatious in his dress and ornaments, let the king, every day, decide, one after another, causes of suitors, separately classified under eighteen Forms of Action, by rules founded on Local Usages and Codes of Law. Of these *Forms of Action* the first is the Recovery of Debts, *the others are*,—(2) Deposit and Pledge, (3) Sale without Ownership, (4) Joint Concerns *or Partnership*, (5) Resumption of Gifts, (6) Non-payment of Wages, (7) Breach of Contract, (8) Rescission of Sale and Purchase, (9) Dispute between the Owner *of cattle* and the Shepherd, (10) Dispute relating to Boundaries *or Tresspass*, (11) Violence consisting of Assault, (12) and *Violence* consisting of Abuse *or Slander and Defamation*, (13) Theft, (14) Force *consisting of robbery, hurt or violence on women*, (15) Adultery, (16) Duties of Man and Wife, (17) Partition *and*

Inheritance, and (18) Gambling and Betting:—these are in this world the eighteen foundations upon which litigation rests.—Manu, viii, 2-7.

Nárada has added another form of Action called प्रकीर्णकम् or Miscellaneous, which includes various matters that cannot come under those declared by Manu, and in which the Action arises at the instance of the king. The first and the last lines of Nárada's description of it are as follows:—

२३। प्रकीर्णके पुनर्ज्ञेयो व्यवहारो नृपाश्रयः।
न दृष्टं यच्च पूर्व्वेषु सर्वं तत् स्यात् प्रकीर्णके॥

23. In the Miscellaneous Form of Action, the litigation depends upon the king. Whatever is not considered in the foregoing *Forms of Action*, all that would come within the Miscellaneous Form of Action.

२४। स्मृत्याचार-व्यपेतेन मार्गेणाधर्षितः परैः।
आवेदयति चेद् राज्ञे व्यवहारपदं हि तत्॥
याज्ञवल्क्यः—२, ५॥

24. If a person wronged by others in a way contrary to the Smriti or Custom complains to the king, then arises a Cause of Action.—Yájnavalkya, ii, 5.

ORIGIN AND SOURCES OF LAW, SCHOOLS, &c.

ओम् नमो भगवते वासुदेवाय।

Divine origin of laws.—The Hindus believe their law to be of divine origin, and they believe this not only of what Austin calls the laws of God, but positive law also is believed by them to have emanated from the Deity. The idea of Sovereign in the modern juridical sense was unknown to them. They had kings, but their function was defined by the divine law contained in the Smritis, and they were bound to obey the selfsame law, equally with their subjects. By this original theory of its origin, the law was independent of the state, or rather the state was dependent on law, as the king was to be guided in all matters connected with Government, by the revealed law, though he was not excluded from a control over the administration of justice. The king being theoretically the administrator of justice his decrees must have been recognized as binding on suitors from the very earliest times. And this gradually introduced the view recognized by commentators that

royal edicts in certain matters have as much binding force as divine law, should the former be not repugnant to the latter.

The earlier notion of law was gradually modified to a certain extent, as may be gleaned from the remarks of the commentators. And the conception of positive as distinguished from divine law, presented to us by the commentators, nearly approaches the ideas of modern jurisprudence.

The sources of law.—The term source of law is used in two senses: in one, the Deity according to the Hindus, and the Sovereign according to modern jurisprudence, is the fountain source of law; and in the other sense, the term means that to which you must resort to get at law, in other words, the evidence or records of law, which you are to study for the purpose of learning law. In this sense, the sources of Hindu law are the Sruti, the Smriti, and the Immemorial and *approved* Customs, by which the divine will or law is evidenced.

Sruti.—The Sruti is believed to contain the very words of the deity. The name is derived from the root *sru* to hear, and signifies what was *heard*.

The Sruti contains very little of lawyer's law: they consist of hymns, and deal with religious rites, true knowledge and liberation. There are, no doubt, a few passages containing an incidental allusion to a rule of law, or giving an instance from which a rule of law may be inferred. The Sruti comprises the four Vedas, the six Vedángas, and the Upanishads: Text No. 5. The Upanishads embody the highest principles of Hindu religion, referring to which Schopenhauer says,—"In the whole world there is no study so beneficial and so elevating as that of the Upanishads. It has been the solace of my life, it will be the solace of my death."

Smriti.—The Smriti means what was *remembered*, and is believed to contain the precepts of God, but not in the language they had been delivered. The language is of human origin, but the rules are divine. The authors do not arrogate to themselves the position of legislators, but profess to compile the traditions handed down to them by those to whom the divine commands had been communicated.

The Smritis are the principal sources of lawyer's law, but they also contain matters other than positive law. The complete Codes of Manu and Yájnavalkya deal with religious rites, *positive law*, penance, true knowledge and liberation. There are some that deal with positive law alone, such as the Code of Nárada, now extant. Many others contain nothing of civil law. The Smritis as a whole deal with man as a being of

infinite existence, whose present life is like a point in a straight line infinite in both directions.

It should be noticed that writers on the Mímánsá system of Hindu Philosophy discuss the question,—Why should Smritis composed by human beings be taken as evidence of *Dharma* or Law, of which Revelation is admitted by all to be the only source? They maintain that the Smritis must be *inferred* to be founded on lost or forgotten Sruti, inasmuch as they are compiled from memory, and are declared as embodying binding rules of conduct, by the sages who were perfectly familiar with the Vedas, and who admitted the Sruti alone and nothing else, to be the foundation or evidence of Law; and as they have all along been adopted and followed in practice by the sages, as well as by other persons learned in the Vedas and entertaining the same view with respect to the origin and source of Law. They also notice an objection that may be raised to this, namely,—Why then have not, the very words of the original revelations that are supposed to be the foundation of the Smritis, been preserved? And they refute it by saying that human memory being frail, there is no wonder that precepts should be remembered while the exact words in which they had originally been expressed might be forgotten. There is a great distinction between the sacred literature dealing with rules regulating the conduct of men in this world as members of society, and that relating to purely religious matters; the precepts of the former are observed in practice, while the latter is rather theoretical in character, the wording of which was therefore of greater importance than that of the former. The rise of different Sákhás or schools of Vedic literature affords evidence of the loss of the exact wording of portions of the latter kind of Revelation, since parts of the Vedas, found in one Sákhá are wanting in others, showing that when the Vedic literature used to be handed down by tradition, parts were omitted by different Sákhás with a view to lighten the burden on the memory of students: and the practice with the teacher of a particular Sákhá, who was familiar with the other Sákhás also, was not to teach to a pupil of his own Sákhá, the exact wording of those portions of other Sákhás, that were wanting in his own, but to give their purport in his own language, so that the same might not be mistaken as part of his own Sákhá.

It is worthy of notice that the inference set forth above forms the foundation of the authority of the Smritis.

When this inference cannot properly be made with respect to a particular precept of Smriti, then the same must be disregarded as spurious. Thus, if a Smriti is in conflict with Sruti, it must be rejected as being not founded on Revelation. Similarly, a passage of Smriti, the origin of which may reasonably be attributed to the covetousness of priests, or to the selfishness or the like improper motive of some persons who might introduce any interpolation in it, connot be regarded as authoritative, but should be discarded as a fabrication and interpolation :—See Texts, No. 8.

Dharma, Law & Sources.—The word *dharma* is generally rendered into Law and includes all kinds of rules religious, moral, legal, physical, metaphysical or scientific, in the same way as the term Law does, in its widest sense. The word is derived from the root *dhri* to hold, support or maintain, and it means law, or duty, or the essential quality of persons or things. By the term *dharma* is understood the rules whereby not only mankind but all beings are governed ; it also imports duty or distinctive feature of beings implying subjection to, or control by, the rules. The term *Shástra* is derived from the root *Shás* to teach, enjoin or control, and means teacher. The Sruti and the Smriti are comprehended by the term *Dharma-shástra* in its primary sense, inasmuch as the objects of both are to teach of rules or duties. But the word *Dharma-shástra* is often used to designate the Smritis alone, with a view to mark their practical importance : thus Manu says,—

श्रुतिस्तु वेदो विज्ञेयो धर्म्मशास्त्रन्तु वै स्मृतिः ।

which means,—"By Sruti is known the Veda, and by Smriti the *Dharma-Shástra.*"

The Vedas are rather theoretical than practical : of the Vedas, the Rik consists of hymns in praise of Gods and things ; the Sáman consists of hymns intended to be sung ; the Yajus describes sacrifices and their ceremonial ; and the Atharvan is disapproved as it prescribes ceremonies that may be performed for causing injury to an enemy or the like ; the Upanishads deal with theology and the means, implying esoteric Hinduism, whereby a person may attain *moksha* or liberation of the soul from the necessity of repeated births and deaths, and its restoration to its original state of (सच्चिदानन्दः or) Existence, Knowledge and Beatitude—the *Summum Bonum* of the Hindus. While the Smriti lays down rules relating to sacramental and other religious rites, and positive law, and pollution, penance and theology,

intended to be practically observed by men in the course of their lives; and in doing so, it embodies, in modern Sanskrit, many of the rules of the Sruti; and accordingly the term Dharma-Shástra is applied to it with a view to thrust into prominence its importance in a practical point of view.

Dharma is defined by Jaimini the founder of the School of Hindu philosophy, called *Púrva* (prior) *Mímánsá*, to be the means of attaining the desirable ends of man, knowable from the Vedic precepts alone: (Text No. 6). The ends of man or पुरुषार्थाः are, four, namely,—धर्मार्थकाममोक्षाः or Religious merit securing heavenly happiness after death, Wealth, Desirable objects other than these, and *Moksha* or liberation from metempsychosis or Restoration of the soul to its own real state of (सच्चिदानन्दः or) Existence, Knowledge and Beatitude, the realization of which is prevented by Máyá or illusion. It should be noticed that the term "Desirable objects" includes the other three of the group of four; but they are separately mentioned to indicate the importance attached to them by different persons.

The term *Dharma*, therefore, includes not only what are conveyed by the term Law in its widest sense, but also persons and things that may be the means of attaining any of the desirable ends. And positive law which is conducive to the welfare and well-being of people, is comprehended by the term "Desirable objects."

In the English translation of the original texts, the word Law is generally used as equivalent to *Dharma*, leaving out of consideration any thing else comprised by it according to Jaimini. And that appears to be the sense in which the word is generally used.

It is in this wide sense, that the sources of *dharma* or law are (1) the Sruti, (2) the Smriti, and (3) the Immemorial Customs. The first though of the highest authority is of very little importance to lawyers. The last again are of very great importance, as being the rules by which the people are actually guided in practice, and their value has come to be specially recognized under the British rule, and authorized records of customs of various localities have been compiled. They override the Smritis and their accepted interpretation given by an authoritative commentator, should these be inconsistent with them. They prove that the written texts of law are either speculative and never followed in practice, or obsolete. The Hindu commentators have not, except in a few instances, devoted much attention to these unrecorded customs and usages,

though they recognize their authority as a source of law. They have confined their attention to the Smritis alone, which constitute the primary *written* sources of law. The customary law will be discussed later on.

The exact number of the Smritis cannot be stated, many of them are not extant, being either lost or unprocurable. From the quotations in the various commentaries you may make a list of the Codes. Most of them are written in metre, and a few in both prose and metre. They do not appear to have been written at the same time, nor do they lay down the selfsame law; and a process of development may be perceived in them. Thus there is conflict of law as laid down in the different Codes on various matters.

Conflict of law and commentaries.—Conflict of law, however, is opposed to the theory of its divine origin, from which perfect harmony between the different Codes must necessarily be expected. The conflict between the Smritis, seeming or real, has given rise to the commentaries or digests that are called Nibandhas. Conflict between the Shástras, however, is admitted and the mode of reconciling them is pointed out thus:—"When there is a conflict between two texts of the Sruti or of the Smriti, they are to be presumed to relate to different cases; but where a text of the Sruti is opposed to one of the Smriti, the former must prevail." (Texts Nos. 16—18.)

Scope of Shastras.—This admission of the existence of conflict of law, opposed to the theory of its origin, has landed the commentators upon a difficulty, which they attempt to get over in the following way:—The proper object of the Shástras, say they, is to teach of things that lie beyond the scope of human reason; what men would do or refrain from doing of their own accord from purely human motives, need not be laid down in the Shástras; accordingly they classify the precepts laid down in the Shástras thus:—where a precept forbids men to do what they may do under the natural impulses, it is called a *Nishedha* or prohibition: but where a precept enjoins men to do a certain thing, when no reason could be suggested for doing it, it is called an *Utpatti-vidhi* or an injunction creating a duty: and a precept regarding what men may do, of their own accord, may come within the purview of the Shástras, if it enjoins that act at a particular time or place; such a precept is called a *Niyama-vidhi* or restrictive injunction: there is a third kind of *vidhi* or injunction called *Parisankhyá* which is an injunction in form, but a prohibition in purport, as for instance,—

"Man shall eat the flesh of the five five-clawed animals,"—which means, that man shall not eat the flesh of five-clawed animals excepting that of the five specified ones: but precepts that do not fall under any one of the above descriptions are called *Anuvádа*, superfluous rules that need not have been laid down in the Shástras.

Positive law and Shastras.—The commentators do, either expressly or by necessary implication, hold that the Shástras in so far as they deal with positive law, are generally *Anuvádа* or superfluous, inasmuch as the rules of positive law are deducible from reason, in other words, from a consideration of what best conduces to the welfare of the society and suits the feelings of the people. This is proved by the systems of law obtaining among non-Hindu peoples who are utterly ignorant of the Shástras. They do, in fact, draw a distinction between positive law on the one hand, and the rules of religious or moral obligation on the other.

Thus the author of the Mitákshará (1, 3, 4,) cites and follows a text which runs thus:—"Practice not that which is legal, but is abhorred by the world, for it secures not spiritual bliss." This text does virtually suggest the maxim *Vox populi est vox Dei* and maintain that popular feelings override an express text of law contained in the Shástras, taking of course, the term law in the limited sense of lawyers.

Factum valet.—On the very same principle does rest the so called doctrine of *factum valet quod fieri non debuit*, usually though not correctly, thought to be peculiar to the Bengal School, and enunciated for the first time by the author of the Dáyabhága, the founder of that school. For, it has been held, and if I may presume to say so, correctly held by the Privy Council in the case of *Wooma Deyi*, I. L. R., 3 Cal., 587, that the doctrine is recognized by the Mitákshará School also. There appear to be considerable misconception and difference of opinion as to what was intended to be laid down by the author of the Dáyabhága in the passage—वचनशतेनापि वस्तुनोऽन्यथाकरणाशक्तेः—which means, "A thing (or the nature of a thing) cannot be altered by a hundred texts." The rule intended to be laid down may be thus formulated,—An act or transaction done by a man in the exercise of a right or power, natural or recognized by law, cannot be undone or invalidated by reason of there being texts in the Shástras prohibiting such act or transaction.

The above passage of the Dáyabhága, was rendered by

Colebrooke into,—"For a *fact* cannot be altered by a hundred texts." The founder of the Bengal School holds that an alienation by a father or a co-heir, of his self-acquired immovable property, or of his undivided share in joint family property, respectively, is perfectly valid, even when made without the consent of his sons in the one case, or of his co-sharers in the other, notwithstanding texts of law requiring such consent. And in support of this position he sets forth the above reason. His argument is this :—Ownership consists in the power of dealing with property according to pleasure ; it cannot but be admitted that the father and the co-heir have ownership, respectively, in the self-acquired immovable and in the undivided share, and consequently power of alienation : hence, the *nature of the thing* ownership, or its incidents such as sale or other alienation, cannot be affected by a hundred texts prohibiting alienation without consent ; such texts therefore, are to be taken as admonitory but not imperative. Of the same effect are texts prohibiting gift or other alienation of the whole of his property by a man having wife and children to support. Parallel to them are passages forbidding the gift in adoption, of an only son by a person in the exercise of *patria potestas* or parental property in a child. This is one of the many principles upon which commentators differentiate between rules of legal and religious or moral obligation, which are blended together in the Codes of Hindu Law.

There is no real difference between the two schools, as regards the tests for distinguishing the rules of legal obligation from those that are merely preceptive. The Mitákshará rule that a co-heir cannot alienate his undivided coparcenary interest in joint property without the consent of his coparceners, is a necessary logical consequence of the doctrine that co-heirs are *joint tenants*, and not *tenants in common* as in the Bengal School. Hence the distinction in this respect does not support the opinion that the doctrine of *factum valet* is not recognized by the Mitákshará School to the same extent as in Bengal.

The following observations of the Lords of the Judicial Committee on this maxim are instructive and should be carefully read :—"Their Lordships ought to state their concurrence with the learned Chief Justice in his remarks on the so-called doctrine of *factum valet*. That unhappily expressed maxim clearly causes trouble in Indian courts. Sir M. Westropp is quite right in pointing out that if the *factum*, external

act, is void in law, there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in morals stands good in morals, or what ought not to be done in law stands good in law." *Sri Balusu* v. *Sri Balusu,* I. L. R., 22 M., 423 = 26 I. A., 113, 144.

Practices to be eschewed in Kali age.—So also Raghunandana in his treatise on marriage (Udváha-Tattva) prohibits, contrary to the Smritis and the earlier commentaries, the intermarriage between different tribes, and in support of this position cites a passage from the A'ditya-Purána, which after laying down that certain practices including intermarriage, though authorized by the Sástras, are not to be followed in this Kali age, concludes thus—"In the beginning of the Kali age these practices have been prohibited after consideration by the learned for the protection of the people: *and a convention come to by the virtuous has as much legal force as a text of the Veda.*" (Text No. 19).

Thus we see that the rules of the Sástras in so far as they relate to secular as distinguished from purely spiritual matters, are not inflexible, but may be modified or replaced if repugnant to popular feelings, or if in the opinion of the learned the exigencies of Hindu society require a change. The Sástras therefore, do not present any insurmountable difficulty in the way of social progress, and Hindus may re-constitute their society in any way they like without renouncing their religion.

Whether these practices (Text No. 19) have become illegal by reason of the said prohibition, is a question which has not as yet been considered by our courts. In one case the affirmative was assumed, and an intermarriage was pronounced invalid: *Melaram* v. *Thanooram,* 9 W. R., 552.

Pura'nas.—The above quotation from the A'ditya-Purána shows that the Puránas also are considered by the later commentators as a source of law. Jurisprudence, however, does not come within the scope of the subjects that are, according to the Puránas themselves, dealt with in them: (Text No. 12). They are voluminous mythological poems professing to give an account of the creation, to narrate the genealogy of gods, of ancient dynasties and of sacerdotal

families, to describe the different ages of the world, and to delineate stories of Gods, ancient kings and sages; and in doing so they also relate religious rites and duties. These works are said to have been composed by the celebrated Veda-Vyása or compiler of the four Vedas, and are enumerated in some of the Puránas to be eighteen in number. But there are many other works of the same kind, the authorship of which is not attributed to Vyása which appear to have been written subsequently, and which are on that account styled Upa-Puránas, and are respectively deemed supplementary to one or other of the eighteen Puránas. The Puránas are not considered authoritative so as to override the Smritis, but are deemed to illustrate the law by the instances of its application, that are related by them and are looked upon as precedents: (Text No. 18). With respect to their authority in matters of positive law, Professor Wilson rightly observes that "the Puránas are not authorities in law; they may be received in explanation or illustration, but not in proof." It should be observed that the doctrine of prohibition in the Kali age, of certain practices which are authorized by the Smritis, is enunciated by some of the Upa-Puránas, and cannot, therefore, be entertained by our courts, if the Puránas are not authorities in law.

Customs:—Divine will is evidenced also by immemorial customs, indicating rules of conduct; in other words, such customs are presumed to be based on unrecorded revelation. Manu and Yájnavalkya declare सदाचारः *approved* custom or usage to be evidence of law. Some of the other sages use the term शिष्टाचारः meaning *usage of the learned* instead of, and as equivalent to, the said expression सदाचारः meaning *approved usage* or *usage* of the virtuous. By that term are to be understood the traditional usages prevailing in a particular locality, which, according to Manu, is Brahmávarta or the country between the two rivers *Sarasvati* and *Drishadvati*, but which, according to other sages, is extended so as to include according to some the whole of Northern India between the Himálaya and the Vindhya mountains excluding the Punjab and probably the Eastern part of Bengal. Although from the explanation of these terms, as given by some of the sages, they seem to be limited to the usages of those that are virtuous and versed in the sacred literature, yet as the usages prevailing among tradesmen, artizans and the like are maintained by the sages themselves to be binding on them, they are not to be taken as limited or qualified in that manner. The limitations or quali-

cations, however, may be taken to be intended to exclude *immoral* customs.

The subject of *immoral* customs and usages is not free from difficulty. There are certain communities in India, whose existence itself may be attributed to vice and want of morals, as for instance the dancing girls and the women of the town. The Hindu Law recognizes the prostitutes as forming a separate community and existing from immemorial times, and lays down rules relating to disputes between them and their paramours. The existence of such a class is deemed by the Hindus to be conducive to the welfare of their society, and necessary for the preservation of the chastity of women so highly valued and jealously guarded by them. There are usages among these unfortunate women, that appear immoral to us, although they may be conducive to their happiness, for instance the practice of the adoption of daughters. These outcasted women, most of whom have none to call their own, have recourse to adoption to secure a relation who would look after them in old age, although the minor girls so adopted may have to lead vicious lives: thus this practice looked at from their point of view, appears to be unobjectionable; but from the other, it appears *immoral*. There is a conflict of rulings with respect to the recognition by the Courts of Justice, of this usage as well as a few caste-customs such as that authorizing a woman to abandon her husband and re-marry without his consent, and the usage permitting divorce and re-marriage by mutual consent of the husband and wife. See Mayne § 55.

But it should be observed that when the question comes before the courts for their decision, the mischief has already been done; and the refusal to recognise the usage serves no useful purpose, but in most cases involves great hardship by defeating expectations and disturbing settled arrangements of their property, intended by deceased persons to take effect after their death.

Customs and Smritis or Law.—There is a difference of opinion among commentators on the Mímánsá with respect to the evidentiary force of customs and usages; some commentators are of opinion that usages give rise to an inference of being based on unrecorded or forgotten Sruti or Revelation, in the same way as Smritis do. While others maintain that as the learned of modern times cannot be taken to have been so familiar with the Vedas as Manu and other sages were, the usages observed by the learned of comparatively

recent times cannot give rise to an inference of being founded on Sruti, but can only give rise to an inference of being based on some now lost or forgotten *Smriti* with which they may be presumed to have been familiar. Accordingly they hold that usages are inferior to Smritis, and must not be followed when in conflict with them. But agreeably to the former view usages and Smritis are of equal authority as evidence of law; and in case of conflict between them, the former must be taken to be of greater force as being actually observed in practice.

This view appears to accord with reason more than the other, and has been adopted by the highest tribunal which observes,—"Under the Hindu system of law, *clear proof of usage will outweigh the written text of the law.*"

Custom is explained by the Judicial Committee thus,—"Custom is a rule which in a particular family or in a particular district, has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly." *Hurpurshad* v, *Sheo*, 3 I. A., 259, 285.

It must not, however, be supposed that customs are always in derogation of the general rules of law; for, there may not be any rules of the general law on a subject except what are supplied by customs.

According to Hindu law and the decisions of the highest tribunal, the Indian courts are bound to decide cases agreeably to such customs when proved to exist, although they may be at variance with the School of Hindu law, prevalent in the locality. This appears to be a most salutary rule, regard being had to the facts that many precepts in the Sástras are recommendatory in character, and that many innovations have been introduced by Pandits of the Mahomedan period, who were neither judges nor lawyers, in their commentaries on Hindu law.

This resembles the view taken by German jurists, of customary law, and is opposed to that of Austin who maintains that the rules of customary law become positive law *when* they are adopted as such by the courts of justice or promulgated in the statutes of the State. The great jurist seems to have been thinking of the state of things in England, and not in a country like India where there was no statute law, but where the entire body of laws was based upon immemorial customs and usages.

Definition of custom.—Custom is a rule which in a particular family, or in a particular class of persons, or in a particular locality, has from long usage,—obtained the force of law.

Division of customs.—Customs may be divided under three heads, namely, (1) Local customs, (2) Class customs, and (3) Family customs.

1. Local customs are binding on all the inhabitants of a particular locality which may be the whole country, or a province, or a district, or a town, or even a village.

2. Class customs are customs of a caste, or of a sect, or of the followers of a particular profession or occupation such as agriculture, trade, mechanical art and the like.

3. Family customs are confined to a particular family, such as those governing succession to an impartible Raj. Similar to them are the usages of succession to *maths* or religious foundations.

Essentials of customs.—Antiquity, certainty, reasonableness and continuity are essential to the validity of a custom. On this subject the Lords of the Judicial Committee observe as follows: "Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."—*Rama* v. *Siva*, 14 M.I.A., 570, 585.

Time immemorial.—A custom, in order to have the force of law, must be ancient or *immemorial*. It is therefore important to consider what is to be deemed *time immemorial*. In England the expression Time immemorial, or Time out of mind, or Time whereof the memory of man runneth not to the contrary, is considered to denote legally the time commencing from the reign of King Richard the First, *i.e.*, A.D. 1189.

An opinion has been expressed that in this country the time of the Permanent Settlement should be taken as the limit, and it is asserted that there is no rule of Hindu law on the point.

This assertion, however, is not correct. The Hindu lawyers have laid down a reasonable rule on this question. One hundred

years is the limit propounded by them. Whatever is beyond a century is *immemorial* or out of mind of man whose span of life according to the Sruti extends to one hundred years only: accordingly everything previous to it must be beyond human memory and as such *immemorial*. See Mit. on Yájnavalkya, ii, 27.

Family Customs.—The foregoing observations apply both to local and family customs: a family usage also must be ancient and invariable, and being in derogation of ordinary law must be satisfactorily proved:—*Raja Nagendra* v. *Raghunath*, W. R., 1864, 23; *Chandrika* v. *Muna*, 29 I. A., 70.

But a family usage differs from a local custom in this that it may be given up and discontinued, and the discontinuance whether accidental or intentional will have the effect of destroying it. On this subject the Privy Council remarks:—"Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom which is the *lex loci* binding all persons within the local limits in which it prevails. It is of the essence of family usages that they should be certain, invariable and continuous, and well established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes; and the effect cannot be less, when it has been intentionally brought about by the concurrent will of the family."—*Raja Rajkissen* v. *Ramjoy*, 19 W. R., 8, 12=I. L. R., 1 C., 186, 195.

For the validity of a family custom it is not necessary that the family should possess an estate which is technically known as a Raj in the north of India or a Polliem in the south of India: *Choudhry* v. *Nowlukho*, 2 I. A., 263, 269.

Customs and Usages.—Although the terms custom and usage are often used as convertible terms, still sometimes a distinction is drawn between them, and the former is applied to those rules of which *antiquity* is an essential incident, and the latter is used to designate those that may be of recent origin, such as those relating to trade or agriculture.

With respect to the nature and character of mercantile usage, the Judicial Committee observe:—"There needs not either the *antiquity*, the *uniformity* or the *notoriety* of custom which in respect of all these becomes a local law. The usage may be still

in course of growth; it may require evidence for its support in each case; but in the result it is enough, if it appear to be so well-known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract:" *Juggo* v. *Manik*, 7 M.I.A., 269, 282; 4 W. R., P. C., 8.

The same principles apply to an agricultural usage which may be of recent origin, lapse of a long period of time being not necessary for its growth; for instance, the usage of transferability of occupancy holdings may be established by evidence of transfers by the tenantry without the landlord's consent, to which no objection was made by him: *Dalglish* v. *Guzuffer*, I. L. R., 23 C., 427: 3 W. N., 21.

The Evidence of custom—should be unambiguous and such as to prove the antiquity, uniformity and continuity as well as the publicity of the usage, and the conviction of those following it that they were acting in accordance with law. The statements of experienced and competent persons of their belief that acts done in accordance with the usage are legal and valid are admissible as evidence, provided they be supported by actual examples of the usage asserted: *Gopal* v. *Raghupati*, 7 M. H. C., 250.

Instances in which the custom or usage was followed, especially Judicial decisions, in which the same was recognized, afford evidence of its existence: *Harnabh* v. *Mandil*, I. L. R., 27 C., 379. But a few instances of recent date are not sufficient to establish a custom that must be shown to have existed from time immemorial: *Luchmun* v. *Mohun*, 16 W. R., 179; *Kakarla* v. *Raja Venkata*, I. L. R., 29 M., 24; 16 M. L. J., 8.

But an agricultural or mercantile usage that need not be ancient may be proved by statements of persons who are in a position to know of its existence in their locality: *Sariatulla* v. *Pran*, I. L. R., 26 C., 184.

Sources of positive law.—It has already been indicated that the Smritis and Customs are the sources of the positive or lawyer's law. The definition given by Yájnavalkya, of Cause of Action implies the same view: (Text No. 22). For, it is declared that a Cause of Action arises when a person wronged in a manner *contrary* to the *Smriti or a Custom*, complains to the King. Manu also appears to support the same view; for, he ordains that the King should decide causes of suitors according to rules founded on *local customs and the codes of law*:. (Text No. 20.)

But it has already been observed that certain innovations have been introduced by the later commentators of the Mahomedan period, and are contained in the Upa-Puránas or minor subsidiary Puránas which are modern compositions by Bráhmanical writers. It is on the authority of these spurious works that some recent commentators maintain that certain practices sanctioned or ordained by the Smritis must not be followed in this Kali age. Some of these practices were condemned by the Smritis themselves, some are declared by the Mitákshara and other principal commentaries to have ceased to be binding at present on the ground of the same being abhorred by the people, while the rest appear to have been opposed to the Bráhmanical interests. For instance, the caste superiority of Bráhmanas depended according to the Smritis entirely on the study of the sacred literature and on possession of superior merit, in the absence of which they could not claim to be better than Súdras. The object which these writers seem to have had in view, was, to secure by these innovations their hereditary superiority and exclusiveness by preventing mixture with lower castes. But Puránas cannot override the Smritis which are admittedly superior to the Puránas in authority. In order to obviate this difficulty, these comparatively recent commentators cite by the name of Smriti, those passages of these secondary Puránas which are विधायक-वाक्यानि, that is, which declare rules of conduct, or in other words, which enjoin men to do or abstain from doing anything.

Accordingly, the Pandits who were appointed to advise the judges of the British Indian Courts, on points of Hindu law and usage, misled them by incorrectly representing these innovations to be as authoritative as the Smritis.

And Sir William Jones was misled into giving prominence to certain passages of an Upa-Purána on these innovations, by inserting their English version at the end of his translation of Manu's Code, which passages were palmed off on him, as Smritis or passages of law.

But it should be observed that the names of *Smriti* and *Purána* are given to different works; and while dealing with the relative authority of these *works*, the *Smritis* have been pronounced to be superior to the *Puránas*. Hence it is difficult to understand how some passages of the *Puránas* can be called *Smriti*.

It has already been observed that even passages of the Smriti, the origin of which may reasonably be traced to

covetousness of the priests, or selfishness of any persons, are to be rejected as spurious and fraudulent interpolations.

Hence these innovations, in so far as they appear to be dictated by improper motives of the writers, cannot be regarded to be of any weight; far less can they be treated as authority.

As regards the relative authority of Smritis and Customs when they are in conflict, it has already been shown that it is now settled law that the latter override the former.

But Kumárila Swámin and other commentators of the Mímánsá school of philosophy, who were opponents of the Buddhists and supporters of Bráhmanism, and took upon themselves the task of refuting the peculiar doctrines of Buddhism, felt themselves bound to maintain the superiority of the Sástras over human institutions, and were therefore unwilling to accept the authority of customs and usages that are contrary to the Sástras. Accordingly, those who reluctantly admitted the binding character of such customs and usages, did however, maintain that their authority should be confined only to the locality, or to the caste or the class of persons, where or among whom, they are found to prevail, that is to say, the authority of the Sástras should be curtailed only to that extent and no further.

Commentaries.—The Sruti and the Smriti are, theoretically speaking the sources of law. But all these are now practically replaced by the Nibandhas or digests or commentaries that are accepted as authoritative expositions of Hindu law in the different provinces. The commentators profess to interpret the law enunciated by the Smritis or Codes of Hindu law. A critical reader of the different commentaries on Hindu law will be impressed with the idea, that the positions maintained by them respectively, which are at variance with each other, cannot all be supported by the texts of the Smritis, which they profess to interpret, but which appear to have been made subservient to their views, by ringing changes upon the language of the texts, rather than correctly interpreted. This fiction of interpretation is found in every system of law. A rule of law is sometimes enlarged in its operation so as to include a case not covered by its language, or curtailed so as to exclude a case that falls within its terms: and this is designated rational interpretation based upon intention. Whenever you have a rule that is rigid in theory and you wish to get out of its terms, you must have recourse to the fiction mentioned above. This mode of changing law is not peculiar to Hindu

law, but is common to many systems of jurisprudence. T commentaries, however, have replaced the Smritis; and it not open to any one to examine whether a particular positi maintained by an authoritative commentary accepted as suc in a locality, is really supported by the Sástras.

Clear texts and principles.—But it must not be suppose that the commentators have no respect for the Smritis, a have always disregarded or discarded them for the sake any principle introduced by them. On the contrary wh there is a clear and unambiguous text laying down a particul rule, effect is given by them to it, although the same inconsistent with any principle referred to by them. In fac they refer to common feature while dealing with individua cases, from which a general principle may be deduced. Ou courts, however, have gone further, they have deduced suc general principles from the particular cases, and applied them to other cases to which they were not intended to apply. The generality of the expressions that may be found in som instances were not intended to be expositions of the whole law, and cannot be taken to establish a proposition that may seem to follow logically from them, since the law is not always logical at all: (*Quinn* v. *Leathem*, H. L., 1901, A. C., 459). For instance, a text of Yama provides in clear and unambiguous language that the whole and the half brothers of a member of a joint family succeed equally to his share in the joint *immoveable* property, if succession opens to brothers. Effect is given to this text in the Dáyabhága, but the Calcutta High Court refused to follow it. Another instance is the curtailing of women's rights in inherited Strídhan property, by the deduction by our courts, of a general principle from the curtailment of the heritable right which Jímútaváhana for the first time conferred on women in the property of males even when members of joint families, which (curtailment) he effected on the authority of a particular text relating only to the widow's right to the husband's estate, but extended by him to the estate of all *males*, with respect to which only the law was changed by him, and not intended by him to be extended to Strídhan property, succession to which he had dealt with in a separate earlier chapter, where equal heritable right of sons and daughters in their mother's estate is clearly declared by him, so that it would not be reasonable to say that the daughters take a lesser interest than the sons, in the shares respectively allotted to them.

Of Hindu and Mahomedan periods.—The commentaries of Hindu period appear to have been composed by practical yers, while those that came into existence during the homedan rule, were written by "Sanskritists without law," o seem to be narrow-minded Bráhmanas having no concern h the administration of justice, and whose works are more igious and speculative than secular and practical, and contain ny innovations of a retrograde character. The Mitákshará d the Dáyabhága, the two commentaries of paramount thority giving rise to the two principal schools of Hindu law, works of the former description, compiled by persons of vanced views, who have developed and improved the Hindu w in many respects. There are many works of the latter scription, including the treatises on adoption, which properly eaking, are not entitled to any authority as regards the vel rules sought to be introduced by them, upon the thority of the Upa-Puránas fabricated by Bráhmanical riters for the benefit of their own class.

Age of Dayabhaga.—Jímútaváhana the author of the Dáyabhága appears to have flourished in the last quarter of he eleventh and the first of the twelfth century of the Christian era. The evidence of his age, almost conclusive, is afforded by some passages of the Kála-Viveka another work of the same author, in which he states the occurrence of certain astronomical positions of the sun and the moon in the years 1013 and 1014 of the Saka era, in such a manner that the same appear to have been observed by himself, or to have occurred at his time and were well-known. This agrees with the account of Jímúta, given by Eru Misra in his Kula-Káriká or Social History of the Bengal Bráhmanas, in which he is stated to be the seventh descendant of Bhatta-Náráyana, one of the five learned and virtuous Bráhmanas who together with the five learned Káyasthas were sent by the King of Kányakubja the modern Kanauj at the request of A'disúra the King of Bengal, and who reached Gaur the then capital of Bengal, in the month of Magh of the year 999 of the Sambat era which is 57 years in advance of the Christian era which is 78 years in advance of the Saka era.

As we anticipated above, it now appears from the account given by Eru Misra that Jímútaváhana was the Minister of Viswaksena a King of Bengal, and also Administrator of Justice, and was celebrated for his great learning. See Preface to the second edition of the Dáyatattwa.

Two Schools.—The different commentaries have given ris[e] to the several schools of Hindu law, which are ordinarily said t[o] be five in number. But properly speaking there are only two pri[n]cipal schools, namely the Mitákshará and the Dáyabhága Scho[ols.]

The Mitákshará which is undoubtedly anterior to [the] Dáyabhága is a running commentary on the Institutes [of] Yájnavalkya, by Vijnánesvara called also Vijnána-Yogin [who] cites texts of other sages, and reconciles them where they s[eem] to be inconsistent with the Institutes of Yájnavalkya. [This] concise commentary is universally respected throughout [the] length and breadth of India, except in Bengal where it yie[lds] to the Dáyabhága, on those points only in which they diff[er;] but it may be consulted as an authority even in Beng[al,] regarding matters on which the Dáyabhága is silent. [The] Dáyabhága, however, is not a commentary on any particu[lar] code, but professes to be a digest of all the codes, while [it] maintains that the first place ought to be given to the code [of] Manu. This commentary, or that portion of it which is n[ow] extant, is confined to the subject of partition or inheritan[ce] alone, whereas the Mitákshará is a commentary on all branch[es] of law in its widest sense, professing as it does to elucidate th[e] Institutes of Yájnavalkya.

The Mitakshara School—may be sub-divided into four o[r] five minor or subordinate schools that differ in some mino[r] matters of detail, and are severally accepted in the differen[t] provinces, where the Mitákshará is concurrently with some other treatises or with local customs, accepted as authority, the former yielding to the latter, where they differ.

Schools and Commentaries.—The schools, and the commentaries that are respected as authorities respectively, may be stated thus :—

Bengal School	..	Dáyabhága. Mitákshará. Dáyatattwa. Dáya-Krama-Sangraha. Víramitrodaya.
Benares School	...	Mitákshará. Víramitrodaya.
Mithilá School	...	Mitákshará. Viváda-Ratnákara. Viváda-Chintámani.
Bombay School	...	Mitákshará. Vyávahára-Mayúkha. Víramitrodaya.

Madras School	...	Mitákshará. Smriti-Chandriká. Parásara-Mádhava. Víramitrodaya.
I may add, The Punjab School	...	Mitákshará. Víramitrodaya. The Punjab customs, compiled in the Riwaz-i-am.

The Víramitrodaya generally follows and maintains the doctrines of the Mitákshará. It refutes the contrary doctrines of the Bengal school, meeting the arguments put forward by the founder of that school and by his follower Raghunandana the author of the Dáyatattwa, to support the positions that are opposed to the Mitákshará school. In the unchastity case, (*Moniram* v. *Keri*, I. L. R., 5 C., 776=7 I. A., 115) the Judicial Committee held that the Víramitrodaya "may also, like the Mitákshará, be referred to in Bengal in cases where the Dáyabhága is silent."

The Schools of Hindu Law are recognized by the later commentators, and cite opinions of the founders of other schools thus, (इति प्राच्याः, or इति दाक्षिणात्याः, and so forth) so say the eastern lawyers or the southern lawyers.

Works on adoption.—The Dattaka-Mímánsá and the Dattaka-Chandriká are two treatises on adoption, which have come to be regarded as authority by reason of their being translated into English at an early period of British rule, and of the mistaken view of their being works of authoritative commentators: and it is said that where they differ, the latter is accepted as an authority in Bengal and in Madras; while the former is respected in the other schools. But the truth is that the first purports to be written by a Benares Pundit in the middle of the seventeenth century, and the second appears to be a literary forgery; and the innovations introduced by them were nowhere followed by the people in practice, nor is there any cogent reason why they should be.

Dattaka-Chandrika a literary forgery.—There is a great dispute regarding the authorship of the Dattaka-Chandriká. The work professes to have been written by Mahámahopádhyáya Kuvera. That notwithstanding, Sutherland, the learned translator, came to the conclusion that it was composed by the author of the Smriti-Chandriká, apparently from a misconception of the meaning of the sloka with which the book opens. The styles of the two works are so different that they cannot

be held to have been written by the same author. In Bengal, however, there is a tradition that it was a literary forgery by Raghumani Vidyábhúshana who was the pundit of Colebrooke. There are only two slokas in the book, composed by the author; the opening one misled the learned translator of the work into the opinion mentioned above, and the concluding one which is an acrostic, supports the Bengal tradition. It runs as follows :—

र—म्यैषा चन्द्रिका दत्त-पद्धते र्दर्शिका ल—घु ।
म—नोरमा सन्निवेशै-रङ्गिणां धर्म्मतार—णिः ॥

The tradition furnishes us with the account of the circumstances under which the book was written, and the internal evidence afforded by the book itself lends considerable support to it. The circumstances under which it was composed may shortly be stated thus: There was a well-known titular Raja of Bengal, who had adopted a son before a son was born to him. After his death a dispute arose between the real and the adopted sons regarding succession to the estate left by the titular Raja. The estate left by the Raja was supposed to be a Raj, and one of the questions raised was whether the adopted son could take a share of the Raj; and the other question was whether the adopted son could take an equal share with the real legitimate son, regard being had to the fact that the parties were *Káyasthas* of Bengal, who were taken to be Súdras. Both these questions were to be answered in the affirmative according to the exposition of law contained in this book, and the book itself is believed to have been written at the instance of the party claiming by virtue of adoption.

The Dattaka-Mima'nsa',—also appears to be written on purpose to invalidate the affiliation of a daughter's son. It is doubtful whether it was really written by Nanda Pandita. The biased and forced arguments advanced by its author in support of the innovations introduced by him, especially in the second Section, give rise to a suspicion that it is similar to the Dattaka-Chandriká as regards its origin.

There is no cogent reason for regarding these treatises as authority. But the adventitous circumstance of being translated into English at a comparatively early period, and the ignorance of their age, led the judges to treat them as authority. Justice Knox who is a Sanskrit scholar held that their authority is open to examination, explanation, criticism,

adoption, or rejection like any scientific treatises on European jurisprudence. But the Judicial Committee observes that their Lordships cannot concur with that learned judge, because, "such treatment would not allow for the effect which long acceptance of written opinions has upon social customs, and it would probably disturb recognised law and settled arrangements." Their Lordships, however, add,—"But, so far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned judge."—*Sri Balusu v. Sri Balusu*, 26 I.A., 113, 132=I.L.R.,22 M., 398.

Collector of Madura *v.* **Mootoo Ramalinga.**—The following extract from the judgment of the Privy Council in the case of *Collector of Madura* v. *Mootoo Ramalinga Sathapathi*, in 12 M. I. A., 397, 435—throws considerable light on several points and should be carefully perused :—

"The remoter sources of the Hindu law are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator puts his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose. Thus the Mitákshará, which is universally accepted by all the schools except that of Bengal, as of the highest authority, and which in Bengal is received also as of high authority, yielding only to the *Dáyabhága* in those points where they differ, was a commentary on the Institutes of Yájnavalkya; and the Dáyabhága which, wherever it differs from the Mitákshará, prevails in Bengal, and is the foundation of the principal divergences between that and the other schools, equally admits and relies on the authority of Yájnavalkya. In like manner there are glosses and commentaries upon the Mitákshará which are received by some of the schools that acknowledge the supreme authority of that Treatise, but are not received by all. This very point of the widow's right to adopt is an instance of the process in question. All the schools accept as authoritative the text of Vasishtha, which says, 'Nor let a woman give or accept a son unless with the assent of her lord.' But the Mithilá school apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and therefore, that a widow cannot receive a son in adoption, according to the Dattaka

form, at all. The Bengal School interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the Mayúkha and Kaustubha Treatises which govern the Mahrattá School, explain the text away by saying, that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus upon a careful review of all these writers, it appears, that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband.

"The duty therefore, of an European Judge who is under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governed the District with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, *clear proof of usage will outweigh the written text of the law.* * * *

"The highest European authorities, Mr. Colebrooke, Sir Thomas Strange and Sir William Macnaghten, all concur in treating as works of unquestionable authority in the South of India the Mitákshará, the Smriti-Chandriká, and the Mádhavyam, the two latter being, as it were the peculiar Treatises of the Southern or Drávida School. Again, of the Dattaka-Mímánsá of Nanda Pandita, and the Dattaka-Chandriká of Devanda Bhatta, two Treatises on the particular subject of adoption, Sir William Macnaghten says, that they are respected all over India; but that when they differ the doctrine of the latter is adhered to in Bengal and by the Southern Jurists, while the former is held to be the infallible guide in the provinces of Mithilá and Benares."

Mitakshara & Dayabhaga.—The Mitákshará is undoubtedly the earlier of the two leading treatises of paramount authority, and the Dáyabhága is deemed as an enactment amending the Mitákshará law in Bengal. This view follows from what is stated in the above case and also in *Bhugwandeen Doobey's* case: 11 M. I. A., 487, 507. And in the well-known case of *Kerry Kolitanee*, Justice Dwarkanath Mitter after referring to a passage of the Mitákshará in a Bengal case, explains the same view, in these words,—"It is true that there is no special

discussion on this point in the Dáyabhága, but the reason of this omission is obvious. The authority of the Mitákshará, it should be remembered, was at one time supreme even in *Bengal*, and as the author of the Dáyabhága did not intend to dispute the correctness of all the propositions laid down in that treatise, we need not be at all surprised at his silence in regard to some of them. It is for this reason that the Mitákshará is still regarded as a very high authority on all questions in respect of which there is no express conflict between it and the works prevalent in that school, as may be seen from the remarks made by the Privy Council in the case already referred to": 19 W.R., 367, 372; 7 I. A., 115, 126. See also *Akhay* v. *Hari*, I.L.R., 35 C., 721.

The Dáyabhága may also be referred to in a Mitákshará case, on points in which the latter treatise is silent; and, in fact, all the commentaries of the different schools may be consulted on points in which the treatises regarded by any school as of special authority are silent, in the absence of conflict with any doctrine maintained by that school: *Rai Bishen* v. *Mt. Asmaida*, 11 I. A., 164, 179.

Non-Hindu view of Hindu Law.—Those that are not inclined to accept the Hindu idea of a divine origin of laws would have no hesitation to allow that they are based upon immemorial customs and usages, and call them the *unwritten* laws of India; and as being the law of the majority of the population, these may be deemed the Common Law of the country. But the Hindu Law is not now the territorial law of Hindusthan. In Hindu times the validity of customs such as have already been set forth, was admitted, so the law of inheritance, marriage, &c., under the Smritis, was not purely territorial. The Hindus however, had a complete Code of laws, both Adjective and Substantive, and the latter was discussed under eighteen heads called topics of litigation, which resemble the *actions* of the English Common Law.

Branches of Hindu Law, now in Force.—Under the British rule the Hindus have been suffered to be governed by their own law as regards Succession, Inheritance, Marriage, Religious Institutions, and Caste:—Reg. IV of 1793, Sec. 15. Hindu Law has therefore become the personal law of the Hindus.

The Jurisprudence or positive law as dealt with in the Codes of the Hindu sages appears to be complete and exhaustive, and includes all branches of law, suitable to the exigencies of Hindu society, and actually prevalent therein; so that it cannot be said that the Codes were defective, and

left out of consideration any department of law. And the charge of incompleteness brought forward by Sir Henry Maine in his Village Communities, in consequence of there being a singular scarcity of rules relating to tenure of land, and to the mutual rights of the various classes engaged in its cultivation,—appears to be erroneous and due to the misconception that the present system of land tenures which came into existence since the Permanent Settlement had always existed here. On the contrary, according to Hindu law the peasant was the proprietor of the land cultivated by him, and the ruling power was entitled not as Landlord but as Sovereign, to a certain proportion of the produce yielded by the land, not exceeding one-sixth, which was *tax* not *rent*, there being no words in the Sanskrit language for *landlord*, *tenant* and *rent*; and the relation upon which this payment was based is expressed by the conjoint word राजा-प्रजा-सम्बन्ध: meaning *relation of Sovereign and subject*, though this word is now used to convey the *relation of landlord and tenant*, but it embodies the true fundamental principle of the Land Revenue, and negatives the idea of the State being the Landlord or Proprietor of Land,—an idea contrary to the ancient law and customs of this country.

The Hindu Jurisprudence is divided into two parts: the first deals with adjective law under the name of Vyavahára-Mátriká meaning literary "mother of litigation", and the second deals with the substantive law. All possible wrongs were at first divided into eighteen classes, and there were eighteen Forms of Action corresponding to them: (Text No. 20). Later on another class was added to obviate the difficulty created by the earlier classification, similar to that which gave rise to the Court of Chancery in England, and another Form of Action was recognised corresponding to that class under the name of Miscellaneous प्रकीर्णक, (Text No. 21), in which the proceeding commenced at the instance of the King, who had to be moved by parties in cases instituted for their benefit, when these cases could not come under any one of the eighteen Forms of Action.—See Introduction to the English translation of the Viváda-Ratnákara, pages XVII *et seq.*

English versions of Sanskrit law books.—Hindu law is locked up in Sanskrit the most perfect and difficult of the ancient classical languages: the codes and the commentaries are all written in it, to which our lawyers and judges have no access. They have, therefore, to acquire the knowledge of

Hindu law from the English versions of the Sanskrit works, the English text-books on Hindu law, and the reports and the digests of the case-law.

As regards the translations of works on Hindu law, a few purport to be done by persons who were either almost ignorant of Sanskrit, or had but a smattering of the same. The Viváda-Chintámani purports to be translated into English from the original Sanskrit by a Bengali gentleman who had very little knowledge of Sanskrit: it was translated into Bengali by a Pandit appointed by him, and then the Bengali version was done by him into English. This accounts for the many mistakes that are found in this work. The author of the English version of the Smriti-Chandriká also, had only an imperfect knowledge of Sanskrit.

It is remarkable that some persons are affected by a peculiar weakness which creates a hankering after the false reputation of being a Sanskrit scholar, which may no doubt be of some advantage to a lawyer. It is not difficult for an educated Hindu whose mother tongue is derived from Sanskrit, to pick up a smattering of Sanskrit, and to deceive those that are completely ignorant of it, by a show of his really second-hand knowledge, and to pass for a Sanskrit scholar before them; and sometimes such a person is found to become ultimately so self-deceived as to fancy himself a master of that language, which in truth he is not. Mistakes arise not only from the translator's imperfect acquaintance with the original, but there are various other causes and circumstances from which errors and imperfections creep into the English translation, even when done by genuine Sanskrit Scholars. The Sanskrit works on law cannot be fully understood even by a Sanskrit scholar except with the aid of learned Pandits familiar with the traditional interpretation of them.

Besides, lawyers and judges without Sanskrit, sometimes misconstrue and misunderstand the meaning of passages of the English versions, in consequence of their ignorance of the method of writing and the process of reasoning adopted by the commentators. The Full Bench decision in the case of *Apáji* v. *Rám*, I. L. R., 16 B., 29, furnishes an instance of misapprehension of the meaning of a passage of the Mitákshará by the majority of the learned judges.

The division of the English versions into small paragraphs, made by Colebrooke and other translators, solely for the convenience of reference, misleads the readers to think each of

these paragraphs to correspond to a verse in the original, and to be complete in itself, whereas the originals are written in prose, quoting passages from the Smritis, which are no doubt in verse, in the majority of instances, and a paragraph may be a link in a chain of argument extending over more than one paragraph.

Who are governed by Hindu law?—The Hindu law applies to Hindus by birth, that have not openly renounced Hinduism by adopting any other religious persuasion. Buddhists, Jainas and Sikhs of India who had been Hindus continued to be governed by Hindu law, notwithstanding their renunciation of the Hindu religion and usages, as there was no civil law intimately connected with their religion or system : and they are still amenable to Hindu law. The Hindus and the Buddhists were expressly excluded from the operation of the Succession Act, the present territorial law on the subject; and the Sikhs and the Jainas appear to have been included under the term 'Hindu' in that Act. Hindu perverts to Islamism are subject to the Mahomedan law of inheritance which forms part of their divine law. Some difficulty had been felt about the law to be applied to Hindu apostates to Christianity, there having been no territorial law on the subject before the passing of the Succession Act in 1865 A.D. Hindu law was applied to those that followed the customs and usages of the Hindus in other respects.

In the case of *Fanindra Deb Raikat* (I. L. R., 11 C., 463) the Judicial Committee have laid down that a family that was not Hindu by descent and origin, but had gradually adopted Hindu customs, was not, on that account, to be governed in all matters by Hindu Law unless proved to have been introduced into it as customs: and held that as the custom of succession upon adoption was not shewn to have been so, the party relying upon adoption had no title.

Renunciation of Hinduism and return:—The following observations of the Judicial Committee with respect to a Hindu becoming a Bráhma, and to a Hindu or a Sikh departing from the standard of orthodoxy in matters of diet and ceremonial observance, are of some practical importance in these days,—

"The learned judges of the Chief Court examined the literature bearing upon the Bráhmo Society; they had before them much important evidence with reference to the Bráhmos and the relation of their principles and their organization to the Hindu system; and they came to the conclusion that a Sikh or a Hindu by becoming a Bráhmo did not necessarily

cease to belong to the community in which he was born. They also found on the evidence that the testator never became a professed Bráhmo at all. In both these conclusions their Lordships agree.

"Their Lordships agree with the learned judges of the Chief Court in thinking that such lapses from orthodox practice (in matters of diet &c.) could not have the effect of excluding from the category of Hindu in the Act (V of 1881) one who was born within it, and who never became otherwise separated from the religious communion in which he was born." *Rani* v. *Jogendra*, 30 I. A., 249, 257.

A Hindu who has renounced Hinduism is entitled to revert to Hinduism after having performed the religious rite of expiation and repentance (प्रायश्चित्त). Accordingly his infant son can with his consent and approval also revert in the same manner, and can therefore be given in adoption to a Hindu: *Kusum* v. *Satya*, I. L. R., 30 C., 999.

Migration and School of Law.—The Schools of Hindu Law applying as they do to Hindus of particular localities, may be called *quasi*-territorial. Hence it is the *primâ facie* presumption that a Hindu is governed by the school of law in force in the locality where he is domiciled. But this presumption may be rebutted by proof that the family to which he belongs had migrated from another province in which a different school prevails; for, in such a case, the presumption of law is in favour of the retention by the family, of the law and usage of the country of its origin. But this presumption again may be rebutted by proving that the family has adopted the law and customs of the place of its present domicile, and then it will be subject to the School prevailing in that place: (*Ram* v. *Chandra*, I. L. R., 20 C., 409; *Soorendra* v. *M. Heeroomonee*, 10 W.R., P. C., 35; *Lukkea* v. *Gunga*, W. R., G., 56).

The mode in which the religious ceremonies are performed is relied on as the test for determining whether a family proved to have migrated from one province to another, adheres to the law of the former place or has adopted the doctrines prevalent in the place of its new domicile: (*Rutchputty* v. *Chandra*, 2 M. I. A., 132; *B. Padma* v. *B. Dooler*, 4 M. I. A., 259; *R. Srimuty* v. *R. Koo*[illegible], 4 M. I. A., 292; *Ram* v. *Kaminee*, 6 W. R., 295).

It should be observed that it is of the first importance to enquire into the origin of the family. The origin, if ascertained to have been in a different place, gives rise to the presumption that the family preserves the customs of its place

of origin. Of evidences which go to prove or rebut this presumption, the most direct are instances of succession in the family, and next, ceremonies at marriages, births and Shrádhs. *Pàrbati* v. *Jagadish*, 29 I. A., 82 = I.L.R., 29 C., 433 = 6 W.N., 490.

By marriage the wife acquires the domicile of the husband, and the domicile continues during the widowhood unless she adopts a new domicile ; *Kashiba* v. *Shripat*, I. L. R., 19 B., 697.

Statutes on Hindu law.—The Hindu law has to a certain extent been modified and supplemented, (1) by legislative enactments, and (2) by judicial decisions of the highest tribunals in England and India.

The Acts relating to Hindus are—Act XXI of 1850, cited as the *lex loci* Act, which repeals those provisions of the Hindu and the Mahomedan laws, that exclude from inheritance persons professing a religion different from that of the person, succession to whose estate is in dispute ;

Act XV of 1856, which legalizes the re-marriage of Hindu widows in certain cases, and declares their rights and disabilities on re-marriage ;

And Act XXI of 1870 called the Hindu Wills Act and Act V of 1881 called the Probate and Administration Act, which extend to Hindu Wills certain provisions of the Succession Act with some additions and alterations.

Case law.—I now come to the most important source of the present Hindu law, namely, the case-law consisting of the decisions of the Judicial Committee of His Majesty's Privy Council, and of the Highest Courts of Justice in this country. These have practically superseded the Nibandhas or Commentaries. These decisions immediately affect the parties to the suits, but as precedents they are binding on the entire community. In applying the law to particular cases, the judges expressly or by necessary implication enunciate what the law is ; and the view of the law expressed and acted upon by them serves as a guide in similar cases arising subsequently, and is taken to have a binding force. An expression of opinion on a point of law, not necessary to be determined for the purpose of deciding the case, though respected, is not considered to be binding and is called an *obiter dictum*.

European authorities and judges.—The Hindu law as contained in the Commentaries is silent on many points of detail, and the judges of the superior courts have had to supply this deficiency by laying down rules on such points as they were

called upon to decide. The administration of the Hindu law by the English judges shows forth in clear light the administrative capacity, the indomitable energy, the scrupulous care and the strong common sense of the English nation. They commenced to administer justice with the aid of Pundits appointed to advise them on Hindu law. Within a short time the leading treatises and a few others were gradually done into English by Sir W. Jones, Mr. Colebrooke and Mr. Sutherland. Systematic and concise treatises on Hindu law were also composed by Sir F. Macnaghten, Sir T. Strange and Sir William Macnaghten. The opinion of these learned text-writers is respected as being based upon considerable research, and consultation with learned Pandits. It cannot but be admitted by an impartial and competent critic on perusing the reports of cases, that in the majority of instances the conclusions arrived at by the English Judges are perfectly consistent with the law and feelings of the Hindus. But there were difficulties almost insurmountable by foreigners in the way of a correct understanding and appreciation of the argumentative works on a system of ancient law suited to the condition and the feelings of a people, opposed to their own ; especially when they had no access to the original books, and the principles of the system of reasoning, followed by the Hindu writers. The rules of Hindu law on many points *seemed* to the English lawyers to be vague and capable of diverse interpretations. Where therefore arguments *pro* and *con* seemed to them to be equally balanced on any particular point of law they would naturally be disposed to adopt a view that accorded with their own feelings, associations and *præsumptiones hominis*, but which might be altogether opposed to the Hindu view.

In this connection should be read the following observations made by the Judicial Committee in the case of *Runguma* v. *Atchama*, (4 M.I.A., 1, 97):—"At the same time it is quite impossible for us to feel any confidence in our opinion upon a subject like this, when that opinion is founded upon authorities to which we have access only through translations, and when the doctrines themselves, and the reasons by which they are supported or impugned, are drawn from the religious traditions, ancient usages, and more modern habits of the Hindus, with which we cannot be familiar."

The learned writers mentioned above who are called European authorities on Hindu law, are entitled to the gratitude of the general body of Hindus for having brought to light, as it were, their law which had been locked up in a dead language,

the knowledge of which was practically the monopoly of the Bráhmanical hierarchy, who would teach it to none but the members of the regenerate classes.

Sanskrit learning.—Although the members of all the regenerate classes were entitled to *learn* the Sástras, yet the Bráhmanas claimed for themselves the exclusive privilege of *teaching* them. The regenerate classes other than the Bráhmanas have almost disappeared by reason of the prevalence of Buddhism for many centuries, and the subsequent compromise between the Bráhmanism and the Buddhism in the shape of the Tántric system; so that in Bengal if the Bráhmanas, a few Rájputs claiming to be Kshatriyas, and a section of the Vaidyas claiming to be a mixed regenerate class, be excepted, the rest of the Hindus who form the majority and include the other regenerate castes that had adopted Buddhism and had consequently renounced all claims to superiority by birth, and therefore still follow some of the practices prescribed by the Sástras for Súdras, are all deemed to be Súdras, though many of them are no doubt, either Súdras or inferior to them. The Bráhmanas were so jealous of their exclusive privilege of Sanskrit learning, that even the Pandits who accepted the appointment of professors in the Government Sanskrit College of Calcutta, established in 1824 A.D., and who were on that account considered heterodox by the more orthodox members of their own class, could not be induced to impart instructions to students belonging to other than the twice-born castes, so that the Government was at first compelled to adopt the rule that none but boys of the regenerate classes could be admitted as students of that College. It was in 1848 A.D., that the Káyasthas who claim to be Kshatriyas by descent, and later on, other classes of Hindus, obtained the privilege of becoming students of that College. It was, however, not so much by the action of the Government in conferring the privilege on all Hindus, of reading in the Sanskrit College, as by the action of the Calcutta University in making Sanskrit the compulsory second language for study by Hindu students, that Sanskrit learning has been disseminated amongst Hindus. Previously Sanskrit was not taught in our English schools and colleges, and the result was that the Hindu students of all classes, educated in those schools, who had graduated before 1869 A.D., were as a general rule ignorant of the classical language of their own country.

Queen Victoria and British Rule, Defender of Hindu Faith.—The selfish policy pursued by the Bráhmanas for maintaining the

superiority of their class by means of their monopoly of the Sanskrit learning, and the practical exclusion of other classes from the same, could not but re-act on themselves: and the natural consequence of such an ignoble and illiberal principle must necessarily be, as it was, that the knowledge of Sanskrit, became ultimately confined to a few Bráhmana families only, the members of which sought to maintain their own superiority by the application of that very principle, by throwing obstacles in the way of acquisition of learning by members of other families of even their own class. The quality of learning must in such circumstances necessarily deteriorate when competition is narrowed by excluding the majority of the people from acquiring the same. And the ultimate effect of all this was, the degradation and downfall of the Hindus.

The British rule has conferred immense good on the people of this country by the spread of education and by other civilising institutions introduced by it. The people of the present day are not aware of the intellectual, moral and religious thraldom, and the divers disabilities under which the general body of the Hindus laboured, and which have been, and are silently and gradually being, removed by the benign influence of the British rule. It is indeed a very high privilege conferred by the British Government on the general body of the Hindus, that they do now enjoy an easy access to their sacred books which were beyond the reach not only of the ordinary people, but also of the Hindu students of the former English schools without Sanskrit. Englismen as well as the people of this country will perhaps be astonished to hear that practically the British Government has bestowed on the mass of the Hindus the privilege of perusing their own religious books, which is expressly denied them by the Bráhmanical legislation providing severe punishment for Súdras trying to pry into the sacred literature. And such was the ignorance of the religious truths taught in the sacred books, that the English-educated Hindus including even Bráhmanas had their faith in their religion considerably weakened, and some of them had recourse to other systems of faith. But with the revival of Sanskrit learning, and an easy access to the sacred books there has been a revival of the Hindu faith to an extent unknown before. And as it is during Queen Victoria's prosperous and glorious reign, that this grand consummation has taken place, Her Majesty may properly be styled the Defender of the Hindu Faith. The Hindu religion being moulded on the principles of

asceticism, the revival of the Hindu faith can by no means be politically dangerous, as is erroneously thought by some persons.

Tying up of property, and alienation.—The law of an independent country may be taken to represent the character and feelings of the people. For instance, the English law is said to abhor the tying up of property: and regard being had to the fact that its people are characterized by prudence and self-reliance, and that a high tone of morality is generally prevalent amongst them, the above feature of the English law is required by the exigencies of English society and conducive to its welfare. But the same rule cannot be applied to India, where the state of things is quite different, and where the tying up of property was the general rule, and alienation of it could be justified only for special causes. If we bear in mind that India is an agricultural and not a commercial nor a manufacturing country, that its people are more subjective than objective, that the caste of the Hindus debars them from the freedom of choice in respect of a calling or occupation, that the father gets his minor sons married, and the sons look to the ancestral property for the support of themselves and of their family, we cannot entertain any reasonable doubt that the rule of Hindu law which imposes limitations on the father's right of alienation of the ancestral property, except for legal necessity, was the most salutary one. And what the exigencies of Hindu society require, and whether it requires a change in the law, are questions most difficult to solve. And I may say without meaning any offence that the effect of an exclusive English education has been more or less to anglicize its Hindu recipients in their ideas and feelings, and to create a wide gulf between them and the bulk of the Hindu community who retain their old habits of thought.

The safest principle to follow seems to be that the Hindu law as it is, should in all cases be adhered to, and no change should be introduced under the pretext of interpreting the same: the Legislature may be appealed to should any rule of law require a change.

It is remarkable that as regards the treatment of debtors and creditors the Legislature and the Highest Tribunals appear to be guided to a certain extent by opposite principles. While the Legislature thinks that in this country the debtors should be protected against the creditors, and passes such Acts as the Chota-Nagpore Encumbered Estates Act, the Oudh Encumbered Estates Act, and the Deccan Ryots Relief Act, for the

protection of the debtors, and recognizes the same principle in framing the Bengal Tenancy Act which does not allow the voluntary transfer of occupancy rights; our courts of justice are changing the Mitákshará law by enabling the father's creditors to seize and sell the family property, and to deprive the family of its hereditary source of maintenance.

Development of Hindu Law by our Courts.—As you are required to read certain chapters of the Mitákshará and the Dáyabhága, I think it my duty to point out to you the principal points in which there seems to be a divergence between the Commentaries and the judicial decisions. They are as follows:

1. That there is no distinction in Bengal between the grandparental or ancestral and the father's self-acquired property as regards his power of alienation when he has male issue.

2. That the Hindus governed by the Dáyabhága School, and others in respect of their separate property, have the power of testamentary disposition.

3. That in Bengal a son has not even the right of maintenance as against his father possessed of property.

4. That according to the Mitákshará School the son's interest in the ancestral property is liable for the payment of the father's debts if not contracted for an illegal or immoral purpose.

5. The alteration in the order of succession according to the Dáyabhága and its well-understood traditional interpretation.

6. The curtailment of the rights of females under both the Schools of law, and especially of those under the Mitákshará law by extending the Dáyabhága principles to them.

7. The theory that an adopted son is entitled to all the rights and privileges of a real legitimate son, save and except those that have been expressly withheld from him.

You will observe that the second and the third propositions depend upon the first, which again seems to have been arrived at by a misapplication of the doctrine of *factum valet*. A careful perusal of the second chapter of the Dáyabhága will convince the reader that the father's estate in ancestral immoveable property resembles the Hindu widow's estate, with this difference that the restrictions on the father's right of alienation except for legal necessity, are imposed upon his estate for the benefit of his male issue, whereas the limitations on the widow's estate form the very substance of its nature, and are imposed upon her not merely for the benefit of reversioners. If the intention of the founder of the Bengal School had been to imply that a father

is, as against his male issue absolute master of the ancestral real property, he would not have entered into a long discussion in order to maintain that on partition of such property, the father is entitled to a share twice as much as is allotted to each of his sons. To argue out at great length that the father on partition of ancestral property is entitled to a double share, and at the same time to declare him the absolute owner of the ancestral estate, would be like the ravings of a madman, to use a favourite expression of the Hindu commentators. The misapprehension appears to have arisen from the extension to ancestral property, of the doctrine of *factum valet* which relates to the property acquired by the father himself.

The acute English lawyers that were connected with the Supreme Courts, either as judges or as advocates, or solicitors are responsible for some of the changes noted above. The Calcutta Supreme Court had to deal mostly with the Bengal school, and its decisions were respected by the Sudder Court that had to administer three schools of Hindu law, prevalent in the territories within its jurisdiction, in the greater portion of which the Dáyabhága is followed. The judges and the pleaders of the latter Court were more familiar with the Bengal law, and unconsciously extended the Dáyabhága rules to the Mitákshará cases. And when this had been done in some cases, and the correctness of the decision was then called into question, it was held to be too late to re-open the point: for, *Communis error facit jus.*

In early times women laboured under great disabilities, the Mitákshará confers on them rights and privileges so as to place them almost on a par with men. In some respects women are placed by the founder of the Bengal School in a more favourable position than what they occupy under the Mitákshará, but it is fenced in by limitations. The Mitákshará females have been subjected to Bengal limitations, while the advantageous position enjoyed by the Bengal females could not be given them. Under both the schools, however, the law relating to females appear to have been construed rather against them. It may be that the Anglo-Hindu lawyers could not conceive the idea that in India which is so backward in material civilization, females could enjoy privileges that were denied to them in England.

The order of succession according to the Bengal School has also been changed upon the erroneous assumption that it is based entirely upon the *pinda* theory introduced by the founder

of the school. And the theory has been so explained as to render the order of succession expressly laid down by Jímúta-váhana, inconsistent with the theory attributed to that acute logical writer. According to the present view, a fraternal nephew's daughter's son is to be preferred to the nephew's son's son, a cognate taking in preference to an agnate of the same degree, although they would succeed in the reverse order to the estate of the brother and the nephew, through whom they are related to the *propositus*: a somewhat unique development of law, opposed to the very spirit of Hindu law, and unknown to any other system of Jurisprudence. It is a doctrine to which no Hindu Pandit versed in Hindu law, can be found to give his assent.

Stare decisis & Communis error facit jus.—Whilst making the above observations, I must ask you to specially note that the law as laid down in the decided cases must be accepted for the present as settled law, and justice will be administered in the courts in accordance therewith, so long as they are not upset by authority. When a particular view of law has been taken in a series of cases, the judges though convinced of its erroneousness, think themselves bound to follow it, for otherwise they might disturb innummerable titles. But having regard to the facts that the people of this country are extremely conservative and tenaciously adhere to their customary law, that they do oftener consult the Pundits than lawyers on matters of Hindu law, that justice is administered by the highest tribunals in a language strange to the people, and that the case-law is not made accessible to the people by translating the reports of cases into their languages, it is doubtful whether the strictest adherence to the maxim *stare decisis* is justifiable in all matters.

In the recent case of *Bhagwan Sing* v. *Bhagwan Sing*, the Lords of the Judicial Committee are reported to have observed :—"For 80 or 90 years there has been a steady current of authority one way, in all parts of India. It has been decided that the precepts condemning adoptions such as the one made in this case are not monitory only, but are positive prohibitions, and their effect is to make such adoptions wholly void. That has been settled in such a way and for such a length of time as to make it incompetent to a Court of Justice to treat the question now as an open one :"—26 I. A., 153 = I.L.R., 21 A., 412.

In another recent case, their Lordships have declared that

Communis error facit jus is a sound maxim : *Jagdish v. Sheo*, 28 I.A., 100 (109) = 5 W.N., 602.

It is submitted with the greatest deference that the principles upon which the rule embodied in this maxim is founded, seem to be inapplicable to India. In England "the courts are reluctant to upset former decisions which although anomalous, have been *accepted by the public as the basis of their transactions* for a length of time." There the Judges are the repositories of the law, and are perfectly familiar with the actual usages of the public, of which they are the leading and eminent members. But the English Judges administering Hindu law have no access to its original sources locked up in a dead though classical language with which they are not acquainted ; nor are they familiar with the actual usages, ideas and sentiments of the Hindu community so different from theirs. On the other hand, the people of this country have no access to the decisions of the superior courts of which the proceedings are conducted and recorded in a language not their own, so that the public here, far from accepting the decisions as the basis of their transactions, continue to adhere to their own law notwithstanding the erroneous view of the same taken in the precedents unknown to them as well as to their advisers, the Pandits. Thus the public here are no parties to the *communis error* which is confined to the courts alone ; and so the law of the courts in these respects has become different from the law of the people, and the reluctance of the courts to upset the decisions has the effect of disturbing settled and cherished arrangements and transactions made by the public on the basis of their customary law. It is difficult to understand why this aspect of the question has escaped the attention of the sages of law adorning the Judicial Committee. It seems that either the grounds for distinction in this respect between the two countries are not noticed by the English lawyers practising in the Privy Council, or they feel so great a veneration for the traditions of the British courts that they do not think it possible to call into question before English Judges the propriety of applying to Indian cases the traditional rule embodied in the maxims, and therefore the attention of their Lordships is not invited to this question. Accordingly their Lordships think that the long acceptance by the courts of a particular doctrine or view of Hindu law, though incorrect, has the same effect here as in England, upon social customs, and that the acceptance of a different though correct view would probably disturb recognised law and settled arrange-

ments: whereas the contrary is found to be the actual case in this country. And although their Lordships go so far as to say that the acceptance of a doctrine for 80 or 90 years by all the courts would "make it incompetent to a court of justice to treat the question as an open one;" still this fact ought to be submitted to their Lordships that the people here ignorant of what passes in the Courts, follow their customary law and usage which are contrary to that doctrine but which are agreeable to their feelings, as is proved by the facts of the very case in which that observation was made; and if they happen to be informed of the view entertained by the courts, they endeavour by means of deeds and wills to guard against their arrangements being upset by the courts, in consequence of the same being contrary to the precedents. For instance, the adoptions that are held in the above case to be wholly void, are believed by the regenerate Hindus to be perfectly valid according to their Shasters, and accordingly they are found to adopt a daughter's or sister's son or the like and to devise by wills their estate to the son so adopted, for the purpose of preventing litigation that might otherwise arise for impugning the validity of the adoption.

It is, therefore, to be regretted that their Lordships did not consider the question whether these maxims should be followed in all cases governed by Hindu law, specially in cases where the acceptance of the right view is not likely to disturb many titles, as where restrictions have been erroneously imposed on the nature of heritable right, or where the liberty of action and choice has been wrongly curtailed in matters which ought to be, as they really are under Hindu law, left to the discretion of men.

Application of stare decisis—The view of law taken by the courts in previous decisions, which was justified by the particular facts of those cases, is sometimes erroneously applied to other cases in which there are certain different facts which were not considered on the previous occasions, and to which that view is inapplicable and was not intended to apply. The following two observations of the Lord Chancellor with respect to the use and application of precedents are important and instructive:—"One is, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of expressions which may be found there, are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what

it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."—*Quinn* v. *Leathem*, L. R., Appeal Cases 1901, p. 495, 506.

CHAPTER II.

DEFINITIONS.

ORIGINAL TEXTS.

१। सपिण्डता तु पुरुषे सप्तमे विनिवर्त्तते।
समानोदकभावस्तु जन्मनाम्नोरवेदने ॥ मनुः—५। ६०।

1. But the *sapinda* relationship ceases in the seventh degree (from the father and the mother); *samánodaka* relationship, however, ceases if tho descent and the name are unknown.—Manu v. 60.

२। सपिण्डता तु पुरुषे सप्तमे विनिवर्त्तते।
समानोदकभावस्तु निवर्त्तेताचतुर्दशात्।
जन्मनाम्नोः स्मृतेरेके तत्परं गोत्रमुच्यते ॥
मिताक्षराधृत बृहन्मनुवचनम्।

2. But the *sapinda* relationship ceases in the seventh degree; the *samánodaka* relationship, however, ceases after the fourteenth; according to some, it exists if the descent and the name are remembered: the word *gotra* is declared to comprise these, (*i. e.* Sapindas and Samánodakas.)—Vrihat-Manu cited in the Mitákshará 2, 5, 6.

३। प्रपितामहः पितामहः पिता स्वयं सोदर्य्या भ्रातरः सवर्णायाः पुत्रपौत्रप्रपौत्राः एतान् अविभक्तदायादान् सपिण्डान् आचक्षते। विभक्तदायादान् सकुल्यान् आचक्षते। सत्सङ्गजेषु तद्गामी ह्यर्थो भवति सपिण्डाभावे सकुल्यः तदभावे चाचार्योऽन्तेवासी ऋत्विग्वा हरेत् तदभावे राजा ॥
दायभागधृत-बौधायनवचनम्।

3. The paternal great-grandfather, the paternal grandfather, the father, the man himself, his brothers of the whole blood, his son and son's son

and son's son's son by woman of the same tribe: all these participating in undivided *daya* or heritage are pronounced *sapindas*. Those who participate in divided *daya* or heritage, are called *sakulyas*. Male issue of the body being left, the property must go to them; on failure of *sapindas*, the *sakulyas*, (and) in their default, the preceptor, a pupil, or the priest, (and) in default of these, the king shall take (the property.)—

Baudáyana cited in the Dáyabhága, xi, i, 37.

[The author of the Dáyabhága takes the word "*daya*" in this text, to mean *pinda* or funeral oblation. See D. B., xi, i, 38.]

४। त्रयानाम् उदकं कार्य्यं त्रिषु पिण्डः प्रवर्त्तते।
चतुर्थः सम्प्रदातैषां पञ्चमो नोपपद्यते॥
अनन्तरः सपिण्डाद् यस्-तस्य तस्य धनं भवेत्।
अत-ऊर्द्धं सकुल्यः स्याद्-आचार्य्यः शिष्य एव वा॥

मनुः—९। १८६-१८७।

4. To three must libations of water be made, to three must *pinda* or oblations of food be presented; the fourth is the giver of these offerings; the fifth has no concern with them. Whoever is the unremote from (among) *sapinda*, his property becomes his. After him the *sakulya* is the heir, then the preceptor or a pupil.—Manu ix. 186-187.

[The third line in the above extract from Manu has been translated by Colebrooke, thus: "To the nearest *sapinda*, the inheritance next belongs." I have given the literal rendering for the purpose of showing the peculiar wording of the line, such as requires grammatical explanation.]

५। अविप्लुत-ब्रह्मचर्य्यो लक्षण्यां स्त्रियम् उद्वहेत्।
अनन्यपूर्विकां कान्ताम् असपिण्डां यवीयसीं।
अरोगिणीं भ्रातृमतीम् असमानार्ष-गोत्रजां।
पञ्चमात् सप्तमाद् ऊर्द्धं मातृतः पितृतस्तथा॥

याज्ञवल्क्यः। १।५२।५३।

5. Let a man who has finished his studentship of the Vedas or sacred literature, espouse an auspicious woman who is not defilled by connection with another man, is agreeable, *non-sapinda*, younger in age and shorter in stature, free from disease, is born from a different *gotra* and *pravara*, *and is beyond the fifth and the seventh from the mother and from the father (respectively).*"—Yájnavalkya, 1, 52-53.

[These two Slokas are in that part of Yájnavalky's Institutes, where the subject of marriage is dealt with. The Mitákshará which is a running commentary on the Institutes, explains the term non-*sapinda* in the above text in the following passage,—]

६। **असपिण्डां** समान एकः पिण्डो देहो यस्याः सा सपिण्डा न सपिण्डा असपिण्डा ताम्। सपिण्डता च एकशरीरावयवान्वयेन भवति। तथाहि पुत्रस्य पितृशरीरावयवान्वयेन पित्रा सह सापिण्ड्यम्। एवं पितामहादिभिरपि पितृद्वारेण तच्छरीरावयवान्वयात्। एवं मातृशरीरावयवान्वयेन माता। तथा मातामहादिभिरपि मातृद्वारेण। तथा मातृष्वसृमातुलादिभिरपि एकशरीरावयवान्वयात्। तथा पितृव्यपितृष्वसादिभिरपि। तथा पत्या सह पत्न्या एकशरीरारम्भकतया। एवं भ्रातृभार्याणामपि परस्परम् एकशरीरारब्धैः सह एकशरीरारम्भकत्वेन। एवं यत्र यत्र सपिण्डशब्दः तत्र तत्र साक्षात् परम्परया वा एकशरीरावयवान्वयो वेदितव्यः।

यद्येवं मातामहादीनामपि "दशाहं शावम् आशौचं सपिण्डेषु विधीयते" इत्यविशेषेण प्राप्नोति। स्यादेतत् यदि तत्र "प्रेतानाम् इतरे कुर्युः" इत्यादि विशेषवचनं न स्यात्। अतश्च सपिण्डेषु यत्र विशेषवचनं नास्ति तत्र "दशाहम्" इत्येतद्वचनम् अवतिष्ठते।

अवश्यं चैकशरीरावयवान्वयेन सापिण्ड्यं वर्णनीयम्। "आत्मा हि यज्ञे आत्मनः" इत्यादिश्रुतेः। तथा "प्रजाम् अनुप्रजायसे" इति च। "स एवायं विरूढः प्रत्यक्षेणोपलभ्यते" इत्याद्यापस्तम्बवचनाच्च। तथा गर्भोपनिषदि—"एतत् षाट्कौशिकं शरीरं, त्रीणि पितृतस्त्रीणि मातृतः, अस्थिस्नायुमज्जानः पितृतः त्वङ्मांसरुधिराणि मातृतः" इति तत्र तत्रावयवान्वयप्रतिपादनात्। निर्बाध्य-सपिण्ड्यान्वयेन तु सापिण्ड्यं मातृसम्बन्धे भ्रातृतत्पुत्रादिषु च सापिण्ड्यं न स्यात्। समुदायशक्त्यङ्गीकारेण रूढिपरित्यागे अवयवशक्तिस्तत्र तत्रावगम्यमाना परित्यक्ता स्यात्। परम्परयैकशरीरावयवान्वयेन सापिण्ड्यं यथा नातिप्रसङ्गस्तथा वक्ष्यामः।

6. **Non-sapinda'm**—She whose *pinda i. e.* body, is the same *i.e.*, one, is *sapinda*; one who is not *sapinda* is *non-sapinda*. Sapiṇḍa relationship arises from conneetion with parts of one body: accordingly, a son's *sapinda* relationship with the father arises by reason of connection with parts of the father's body; similarly (Sapinda relationship) also with the paternal grandfather and the like (arises) by reason of connection with parts of his body through the father; similarly with the mother, by reason of connection with parts of the mother's body; likewise, with the maternal grandfather and the rest, through the mother; similarly, also with the mother's sister, the maternal uncle and the like, by reason of connection with one body; so also with the paternal uncle, the father's sister and the like; similarly (arises the *sapinda* relationship) of the husband with the (*Patni*) lawfully wedded wife, by reason of (they together) forming one body, (*i. e.*, one person, hence the wife is called half the body of the husband); similarly also (arises the *sapinda* relationship) of the wives of brothers (with each other), by reason of (the wives) forming one body reciprocally with those (*i. e.* their husbands) formed from one body (of their father): thus wherever the term *sapinda* is used, there directly or mediately connection with parts of one body is to be understood.

(It is objected), if it be so, then the text, namely,—'Obituary pollution for ten days is ordained among *sapindas*"—would without distinction apply also to the maternal grandfather and the like (cognates). (The answer is), that would have been the case, had there not been

special provision (by way of exception) such as,—"In the case of married females, pollution is observed by others (not by their paternal relations.)" Hence where there is no special text relating the *sapindas*, there the (general) ordinance, namely, "Obituary pollution for ten days &c.," remains (as the one to be applied).

Sapinda relationship, however, must be explained as arising by connection with parts of the body; by reason of the (Sruti) revelation, namely,—"One's own self (in the shape of son) is born from one's own self (in the shape of father), &c." ; likewise, also by reason of another revelation, namely, "Thou art (thyself) born as offspring" ; and by reason of the text of A'pastamba, namely,—"That one's own self is born as son, is visible by perception" ; likewise, by reason of the connection with (particular) parts of the father's and the mother's bodies being established in the Garbha-Upanishad (Upanishad dealing with child in the womb), thus,—"This body is composed of six constituents, three (are derived) from father, (and) three from mother; bone, nerve and marrow from father, (and) skin, muscle and blood from mother." But if *sapinda* relationship were by connection through *pinda* in the sense of oblations presented to deceased ancestors, then there would be no *sapinda* relationship with the mother's line of ancestors, and also with the brother and his son and the like ; and if that meaning of the word *sapinda* were accepted as traditional, upon the assumption that the whole word (irrespective of its components parts) has the power of expressing that meaning (by traditional usage), then, the power of the several constituent parts (of this word *sa-pinda*, namely *sa* and *pinda*) to express their respective apparent meanings would have to be rejected. It will be stated (hereinafter) how *sapinda* relationship by mediate connection with the parts of one body (has been curtailed and so it) would not include those that are not intended.

[The sentence in the above passage of the Mitákshara, relating to the *sapinda* relationship of husband and wife has been erroneously translated by West and Buhler in their Digest of Hindu Law p. 121, 3rd Edition, thus,—

"So also the wife and the husband are *sapinda* relations to each other, because they produce one body (the son)."

The sentence has similarly been wrongly rendered in the Tagore Law Lectures of 1880, p. 601, thus,—

"'So with the wife, by reason of her being a common generator of the same body (the son)."

These learned writers misunderstood the meaning of the Sanskrit words as well as the purport of the sentence. According to their version the husband and the wife would not be *sapindas*, until and unless a son be born to them, and consequently they would not be *sapindas* at all to each other, should they be destitute of issue ; whereas they do become each other's *pinda* from the moment of their marriage.]

७। सपिण्डाम् इत्यत्र, एकशरीरान्वयद्वारेण साक्षात्परम्परया वा सापिण्ड्यमुक्तं, तत्र सर्वेषं सर्वेषं यथाकथञ्चिदादौ संसारि भवतीत्यतिप्रसङ्गइत्यत आह—

पञ्चमात्तमसादूर्ध्वं मातृतः पितृतस्तथा ।

मातृतोमातुः सन्ताने पञ्चमादूर्द्धं पितृतः पितुः सन्ताने सप्तमादूर्द्धं सापिण्ड्यं निवर्त्तत इति शेषः। अतश्चायं सपिण्डशब्दोऽवयवशक्त्या सर्व्वत्र प्रवर्त्तमानोऽपि निर्मन्त्र्य पङ्कजादिशब्दवन्नियतविषयएव। तथा च पित्रादयः षट् सपिण्डाः पुत्रादयश्च षट् आत्मा च सप्तमः, सन्तानभेदेऽपि यतः सन्तानभेदसमादाय गणयेत्-यावत् सप्तमः इति सर्व्वत्र योजनीयम्। तथाच मातरमारभ्य तद्विद्यपितामहादिगणनायां पञ्चमपुरुषवर्त्तिनी मातृतः पञ्चमीत्युपपद्यते। एवं पितरमारभ्य तत्पित्रादिगणनायां सप्तमपुरुषसन्तानवर्त्तिनी पितृतः सप्तमीति। तथाच "भगिन्योर्भगिनीभ्रात्रोर्भ्रातृपुत्रीपितृव्ययोः। विवाहे द्वयादिभूतत्वाच्छाखाभेदोऽवगम्यते।"

यद्यपि वशिष्ठेनोक्तम्—"पञ्चमीं सप्तमीं चैव मातृतः पितृतस्तथा" इति। "चीनतीत्य मातृतः पञ्चातीत्य च पितृतः" इति च पैठीनसिना, तदप्यर्वाक्तिथिधार्थं न पुनस्तत्प्राप्त्यर्थमिति सर्व्वस्मृतीनामविरोधः।

एतच्च समानजातीये द्रष्टव्यम्। विजातीये तु विशेषः। यथाह भगवान्:—"योनिजातावयवाः पृथक्चेष्टा पृथक्फलाः। एकपिण्डाः पृथक्शौचाः पिण्डस्त्रावर्त्तते त्रिषु" ॥ एकजात्या ब्राह्मण्यादिजातयः, एकजातयः। पृथक्चेष्टाः भिन्नजातीयासु स्त्रीषु जातयः। पृथक्फलाः समानजातीयासु भिन्नासु स्त्रीषु जातयः। ते एकपिण्डाः सपिण्डाः किन्तु पृथक्शौचाः। पृथक्शौचनाशौचप्रकरणे वक्ष्यामः। "पिण्ड-स्त्रावर्त्तते त्रिषु" त्रिपुरुषमेव सापिण्ड्यमिति ॥

7. While explaining the term non-*sapinda*, the *Sapinda* relationship is stated to be directly or mediately through connection with one body; but that relationship of all persons may, in one way or other, be traced with all other persons in this world of eternal transmigrations of the soul with its minute body, and so it would include persons that are not intended to be included; hence it is ordained—

"and is beyond the fifth and the seventh from the mother and from the father (respectively)."

The purport is, that *sapinda* relationship ceases beyond the fifth from the mother, *i. e.*, in the mother's line, and beyond the seventh from the father," *i. e.*, in the father's line; hence although the word *sapinda* by its etymological import applies to all relations, yet it is restricted in its signification like the word *pankaja* (the derivative meauing of which is "growing in the mud," but which by usage, means a lotus, being a species of its primary import), &c.: accordingly the six (ascendants) beginning with the father are *sapindas*, as also the six (descendants) beginning with the son, the man himself being the seventh; also in the case of divergence of the line, the counting shall be made until the seventh in descent (is reached) including him (*i. e.* ancestor within six degrees of ascent), from whom the line diverges (*i.e.* a collateral within the sixth degree of descent, from an ancestor within the sixth degree in ascent, is seventh); in this mode is the computation (of degrees) to be made everywhere (*i. e.* in all texts relating to degrees such as three, five or fourteen degrees). Accordingly, it is to be understood that the fifth from the mother is she who is (the fifth) in the line of descent from (any ancestor of the mother, up to) the fifth ancestor (and counting her and such ancestor, each as one degree)—in the computation—beginning with the mother (and counting her as one degree),—of the mother's father, paternal grandfather, and the like: similarly, the seventh from the father is she who is (the seventh) in the

line of descent from (any ancestor up to) the seventh ancestor (and counting her and such ancestor, each as one degree),—in the computation—beginning with the father (and counting him as one degree),—of the father's father, and the like. Accordingly (it is said)—"In marriage, two sisters, a sister and a brother, and a fraternal niece and a paternal uncle, are taken to be two branches by reason of the descent of the two from a common ancestor (from whom computation of the degrees is to be made among their descendants)."

As for what is said by Vasistha, namely —"May marry the fifth and the seventh from the mother and the father respectively,"—and by Paithínasi, namely,—"Beyond the third from the mother and the fifth from the father ;" – these should be taken to intend the prohibition of the nearer degrees indicated therein, and not to allow the espousal of the nearer degrees expressed in them : thus is the conflict between all the Smritis avoided.

This again should be understood to be applicable to those of the same caste. But there is a different rule when the caste is different; thus Sankha ordains—"If there be many sprung from one (but) of separate soil, (or) of separate birth; they are, of one *pinda*, (but) of separate impurity, and the *pinda* exists in three."—'Sprung from one' means, sprung from the same Bráhmana or the like father; 'of separate soil,' means born of wives belonging to different castes; 'of separate birth,' means, born of different wives belonging to the same caste, 'they are of one *pinda*,' *i. e., sapinda*; 'but of separate impurity,'—the separate impurity will be explained in the Chapter on Impurity; 'the *pinda* exists in three,' means, *sapinda* relationship extends to three degrees only."

८। किञ्च पिता पुत्रान्तरेष्वपि साधारणःमाता तु न साधारणीति प्रत्यासत्तिमयात्,—"अनन्तरः सपिण्डादयस्तस्य तस्य धनं भवेत्"—इति वचनात् मातुरेव प्रथमं धनग्रहणं युक्तम्।

न च सपिण्डेष्वेव प्रत्यासत्तिर्नियामिका, अपि तु समानोदकादिष्वपि, अविशेषेण धनग्रहणे प्राप्ते प्रत्यासत्तिरेव नियामिका इति अस्मादेव वचनादवगम्यतइति ॥—मिताक्षरायां दायभागाध्याये ॥

8. But the father (of a person) is a common parent of other sons (by a different wife), but the mother is not so (of other sons by another husband); consequently by reason of her propinquity being greater (than that of the father), it is fit, that the mother alone should take the estate in the first instance conformably with the text (of Manu)—"*Whoever is the unremote from (among) sapiada, his property becomes his.*' (Text No. 4.)

Nor is propinquity the principle for determining the order of succession among only the *sapindas* (technically so called, in texts Nos. 1 and 2, namely, relations within seven degrees), but it is also (the principle for determining the order) among the *samánodakas* and the like ; for, it appears from this very text (of Manu) that when succession is predicated of a body of persons without any distinction, then propinquity alone is the principle for determining the order of succession (among the individuals composing the body).—Mit., 2, 3, 3-4.

9. [The above text of Manu, does, according to the Mitákshará mean.,—"To the nearest relation, the inheritance next belongs,'—but its

wording literally means,—"Whoever is the unremote from (among) *sapinda*, his property becomes his."—This peculiar wording requires grammatical explanation, and accordingly the two commentators of the Mitákshará have made the following verbal comments on it :—]

"यः सपिण्डात् अनन्तरः" सन्निहितः "तस्य" सपिण्डसन्निहितस्य "धनं तस्य" सपिण्डसन्निहितस्य "धनं भवेत्" । विश्वेश्वरभट्टः ।

"Whoever is the unremote" *i. e*, nearest "from (among) the *sapinda* his" *i.e*, the nearest *sapinda's*, "property becomes his," *i. e.*, the nearest *sapinda's* "property."—Visvesvara Bhatta.

"सपिण्डात्" इति दूरान्तिकार्थैरिति षष्ठ्यर्थे पञ्चमी । तथाच, सपिण्डस्य "योऽनन्तरः" सन्निहितः "तस्य" सपिण्डस्य "धनं तस्य" सपिण्डसन्निहितस्य "धनं भवेत्" इत्यर्थः । बालम्भट्टः ।

The ablative case in the word 'from (among) the *sapinda*," is used in the genitive sense, agreeably to (the aphorism of Pánini the celebrated grammarian) दूरान्तिकार्थैः &c.; accordingly, the meaning is,—"whoever is unremote," *i. e.*, nearest "of the *sapinda*, his," *i. e.*, the *sapinda's* "property becomes his," *i. e.*, the nearest-of-the-*sapinda's* "property."—Bálambhatta.

[These are merely grammatical comments, but the rule intended to be laid down is what is clearly expressed in Colebrooke's lucid translation of the text, given above. The context of the Mitákshará, in which the above text of Manu is cited, shows beyond the shadow of a doubt that the word *sapinda* in that text is taken by the author of the Mitákshará in its etymological sense of any relation near or distant, as explained by himself *supra* p. 52), and that the rule applies to heirs of all descriptions whether *sapindas* technically so called, or *samánodakas*, or *sagotras*, or *bandhus*. Hence the suggession made by some writer that Visvesvara Bhatta and Bálambhatta mean to indicate by those comments that two persons must be *sapindas of each other* in order that they may inherit from each other,—is not only fanciful but simply absurd being founded as it is upon the erroneous assumption that one man can be *sapinda* of another man who is not *sapinda* to himself, which again is based upon another absurd assumption that the *sapinda* relationship of females for the purpose of marriage is applicable to their brothers, for which there is absolutely no authority.]

१० । पितरो यत्र पूज्यन्ते तत्र मातामहा ध्रुवम् ॥

10. Where the paternal ancestors are worshipped, there the maternal ancestors also should certainly be worshipped.

११ । अविभक्तधनास्त्वेते सपिण्डाः परिकीर्त्तिताः । ब्रह्मपुराणम् ।

11. *But these* whose property is undivided, are pronounced *sapindas*.—Brahma-Purána.

१२। सम्बन्धविवेके सुमन्तुः—"ब्राह्मणानाम् एकपिण्डस्वधानाम् आ-दशमाद्-धर्मविच्छित्तिर्भवति। आ-सप्तमाद्-रिक्थविच्छित्तिर्भवति। आ-तृतीयात् पिण्डविच्छित्तिः, अन्यथा पिण्डशौचक्रियाविच्छेदाद् ब्रह्म (हत्या?) तुल्यो भवति"॥

अस्यार्थमाह शूलपाणिः—जीवत्पित्रादिविशिष्टस्य तत्प्रपितामहादयस्त्रयः श्राद्धदेवतात्वात् पिण्डभाजो भवन्ति। तदूर्ध्वं त्रयो नवपुरुषपर्य्यन्ता लेपभाजः। श्राद्धकर्त्ता च दशम इति दशमाद् ऊर्ध्वं सापिण्ड्यनिवृत्तिः। दशमादित्युपलक्षणम्, तेन पितृपितामहजीवने नवपुरुषपर्य्यन्तं, पितृजीवने चाष्टपुरुष-पर्य्यन्तं सापिण्ड्यं ज्ञेयं। अपुत्रधनग्रहणे सन्निहिताभावे सप्तपुरुषपर्य्यन्तम् अधिकारः। धनग्राहिणम् आरभ्य तृतीयः पौत्रः, तदूर्ध्वं श्राद्धविच्छेदः। अन्यथा धनहारित्वे अपुत्रश्राद्धाद्यकरणे ब्रह्महत्या इत्यर्थः।

निर्णयसिन्धौ तृतीयपरिच्छेदे विवाहप्रकरणे सम्बन्धविवेकधृतसुमन्तु-वचनं शूलपाणिकृततद्व्याख्यासहितम् उद्धृतम्।

12. Sumantu—cited—in the Sambandha-viveka says,—

"Of Bráhmanas whose *pinda* (*i. e.*, oblation in the form of ball of rice) and *swadhá* (*i. e.*, food-offering to the *manes* of deceased ancestors) are common, the status of *sapinda*-ship ceases after the tenth (degree); heritable right by *sapinda*-ship ceases after the seventh degrees and (*sapinda*-ship for) offering *pinda* (*i. e.*, oblation of food in the exequial rites of a deceased person) ceases after the third degree: if, otherwise, there be cessation of offering of the *pinda*, and of performance of the purifying exequial rites, that would be equal to the murder of a Bráhmana.

Súlapáni explains the meaning of this (text thus),—

(If a deceased person's) three paternal ancestors viz., the father, the paternal grandfather and the paternal great-grandfather be alive, then the three remoter paternal ancestors viz., the great-great-grandfather and his father and paternal grandfather become, by reason of their being gods in the *sráddha* ceremony of the Ancestor-worship, partakers of the (three) *pindas* in the *sapindí-karana sráddha* ceremony of the deceased; and the three (remoter) ancestors after them up to the ninth degree become partakers of the lepa or remnants of the *pinda* oblations; and thus the person performing the Sráddha becomes the tenth, and hence *sapinda* relationship ceases after the tenth degree. It should be understood that the term—"after the tenth degree"—is illustrative, therefore when (the two paternal ancestors viz.,) the father and the paternal grandfather are alive the *sapinda* relationship extends to *nine* degrees, and when the father (alone) is alive it extends to *eight* degrees. To the estate of a person

destitute of male issue the heritable right by *sapindaship* extends to *seven* degrees in default of nearer relations; counting from the first heir, his son's son is the third (in degree) and after him there is cessation of exequial *Sráddha* ceremony. "Otherwise &c." means, if a person inheriting the estate of a sonless deceased relation do not perform his *sráddha* and the like exequial ceremonies, he becomes guilty of murdering a Bráhmana. This is the meaning.

Cited in the chapter on marriage in the 3rd book of Nirnaya-Sindhu.

DEFINITIONS.

Da'ya.—There is a difference between the two schools with respect to the meaning of the term *dáya*. According to the Mitákshará, it is defined thus,—"The term *dáya* signifies that wealth which becomes the property of another, solely by reason of his relationship to the owner." Jímútaváhana, however, says that the word *dáya* by derivation means gift, but in the Law of Inheritance "The term *dáya* is by usage employed to signify wealth in which proprietary right dependent on relation to the former owner, arises *on the extinction of his ownership* by death natural or civil (such as degradation, renunciation of worldly objects, and retirement to a holy place for religious purpose).

This difference in the definition of the term *dáya* arises in consequence of the Mitákshará doctrine of the right by birth, of male issue in the property of the father and other paternal male ancestors in the male line. The Dáyabhága repudiates that doctrine. The Mitákshará therefore adds that *dáya* is of two sorts, namely, *a-pratibandha* or unobstructed, and *sa-pratibandha* or obstructed. According to the Dáyabhága, *dáya* is always *obstructed*, inasmuch as the right does not accrue during the lifetime of the previous owner in any case.

Having regard to the definition of the term *dáya*, as given in the Mitákshará, it cannot be rendered into *heritage* which signifies only what is called *obstructed dáya*, and cannot include the *unobstructed dáya* or the congenital coparceny of the male issue; for, *nemo est hæres viventis.*

Partition.—According to the Mitákshará,—"Partition is the adjustment into specified portions, of divers rights (of the coparceners) which (divers rights) extend to the whole estate." According to the Dáyabhága,—"Partition is the manifesting or making known, by the casting of lots or otherwise, the

proprietary right (of each coparcener), which had arisen in the land and moveables, but which extended only to a fractional portion of the same, that was previously unascertained, and was unfit for exclusive dealing by reason of there being no evidence of any ground of discrimination."

According to the Mitákshará, the right of each coparcener extends to the whole property; but according to the Dáyabhága, it extends to a fractional portion only, or to that portion only which on partition is allotted to him; or in other words, coparceners take as *joint tenants* under the Mitákshará, but as *tenants in common* under the Dáyabhága.

Sapinda.—The term *sapinda* means one *of the same pinda*. The word *pinda* is used in various senses; it signifies thickness, mass, corridor of a house, a ball, food, body which is but assimilated food; and food for departed ancestors, such as a ball composed of rice, &c., presented to the *manes* of ancestors at the Sráddha ceremony.

In the Hindu law books the term has been used in two different senses: in the one sense, it means a relation connected through the same body; and in the other, it means a relation connected through funeral oblations of food.

According to the Mitakshara.—In the Mitákshará the term *sapinda* is used in the sense of, one *of the same body, i. e.*, a blood relation. In this literal sense the term would include all relations however distant. But this derivative denotation of the term, is curtailed by technical limitations; and so it includes relations within the seventh degree according to the Hindu mode of computation. Then again there is this further restriction that this term when used without qualification, signifies agnatic relations only, *i. e.*, the relations of the same *gotra*, the relations of a different *gotra* being included under the term *bandhu* in the Mitákshará,—Text No. 2 cited in Mit., 2, 5, 6.

According to the Mitákshará, therefore, the *sapindas* of a person are, his six male descendants in the male line, six male ascendants in the male line, and six male descendants in the collateral male line of each of the six male ascendants,—altogether forty-eight relations. (See table *infra* p. 66).

The lawfully wedded wives of these relations as well as of the person himself are his *sapindas*. The sacrament of marriage effects physical unity of husband and wife. Text No. 6; D.B., 4,2,14.

As regards the Sapinda relationship of females with males, for the purpose of marriage, it extends to different degrees on the paternal and the maternal sides of the males, according

to most of the sages. The sages again are not agreed as to the number of degrees, to which the Sapinda relationship of females extends: according to different sages, the number of degrees is either 8 or 7 or 6 on the paternal side, and respectively 6 or 5 or 4 on the maternal side, of the bridegroom, which constitutes females within those degrees, his *sapindas* for the purpose of marriage, and therefore prohibited.

It should be specially noticed that this connubial *sapinda* relationship is one between males and females only. It does not affect the *sapinda* relationship between males. There is absolutely no authority for its application to males. But an *obiter dictum* is expressed in two cases, which seems to be based on the suggestion made by a writer as to the intention of the two commentators of the Mitákshará, in the passages (Text No. 9, p. 56 *supra*) explaining Manu's text. This question will be considered while dealing with the meaning of the term *Bandhu*.

Computation of degrees.—The Hindu mode of computation of degrees is the same as that adopted by the Canonists and is different from the English or Civilian mode which is adopted in the Succession Act, Sections 21 and 22, and according to which you are to exclude the *propositus*, and count as one degree each ancestor and each descendant lineal or collateral, down to the relation whose degrees of distance from the *propositus* you are computing. According to the Hindu or Canonist mode which is also called the classificatory mode, you are to count the *propositus* as one degree, and then count his as many ancestors as will make up the given number, taking each ancestor as one degree, and then count as many descendants of the *propositus* himself, and of each of the said ancestors, as together with the *propositus* or that ancestor respectively, will make up the given number. In the above enumeration of the male *sapindas* according to the Mitákshará, you have an instance of relations within seven degrees; and in the enumeration given below, of the first class Dáyabhága *sapindas*, you have an instance of relations within four degrees.

In this connection, I should draw your attention to a Madras decision (I. L. R., 7 M., 548), in which it has been held that a person's maternal grandfather's brother's daughter's daughter is beyond five degrees and therefore eligible for marriage according to the Mitákshará. It is difficult to understand how she could be held to be beyond five degrees except according to the English mode of computation of degrees. The Hindu judge who was a party to that decision appears to have been

"a lawyer without Sanskrit"; otherwise the error would not have crept into the judgment.

Sapindas according to the Dayabhaga.—The above definition of *sapinda* is not altogether lost sight of, in the Dáyabhága. But the author of that treatise explains it to relate to marriage, mourning, &c., and not to inheritance. For the purpose of inheritance, he takes the word *sapinda* in the sense of one connected through the same funeral oblation.

According to the Dáyabhága as understood by the Full Bench in the case of *Guru Gobinda Shaha Mandal*, 5 B.L.R., 15=13 W.R., F.B., 49, the term *sapinda* includes three classes of relations.

The first class includes those relations of a person with whom that person, when deceased, and after the *sapindi-karana* ceremony, partakes of undivided oblations. They are his three male descendants in the male line, three male ascendants in the male line, and three male descendants in the male line, of each of the three male ascendants: or in other words, the son, grandson and great-grandson; the father, grandfather and great-grandfather; the brother, brother's son and brother's grandson; the paternal uncle, his son and grandson; as well as the paternal granduncle, his son and grandson;—altogether fifteen relations. The lawfully wedded wives of these relations as well as of the person himself are his *sapindas* in this sense. It is worthy of remark that the Hindus living in joint families could not conceive an idea of heaven without joint family, the first class *sapindas* are in fact the members of the joint family, associated together in heaven after death. (See table *infra* p. 65).

The second class comprises those relations of a person, that present oblations participated in by that person, when deceased, but do not partake of undivided oblations with him. They are the grandsons by daughter, of the person himself, of his three paternal ancestors, as well as of the son and the grandson of the person himself and his three paternal ancestors,—altogether twelve relations. (See table *infra* p. 65).

The third class comprehends the three maternal grandsires, to whom the deceased was bound to offer oblations, and those relations that present oblations to them. They are the three maternal grandfathers, three male descendants of each of them, and the grandsons by daughter, of the three grandsires, and of two male descendants of each of the three grandsires,—altogether twenty-one relations. (See table *infra* p. 66).

You will yourself be in a position to draw out the list of relations falling under each class mentioned above, if you bear in mind the following propositions in connection with the *Párvana Sráddha* ceremony, namely: (1) A person is bound to offer funeral cakes to his three immediate *sagotra* ancestors male as well as female, and to his three immediate maternal male grandsires. (2) A person after his death, and after the *sapindi-karana* ceremony partakes of undivided oblations with his three *sagotra* male ancestors with whom he is united by that ceremony. The *sapindas* of a person are (according to the Full Bench) those relations with whom he partakes of undivided oblations, those who offer oblations enjoyed by him, those to whom he was bound to present oblations, as well as those who offer oblations to those to whom he was bound to present oblations.

In connection with this subject it ought to be particularly borne in mind that if a person die during the lifetime of one or two of his three immediate *sagotra* ancestors, then his *sapindi-karana* ceremony which must be performed with three *sagotra* ancestors, is to be performed by uniting him with two or one respectively of his paternal ancestors further removed than three degrees. Thus, most, if not all, of the *sakulyas* may come under the first class of *sapindas*: See Text No. 12.

According to all the Sanskrit commentators, the term *sapinda* in the sense of connected through funeral oblations, includes the first class only: of these also, the three ancestors and the three descendants in the male line, only, are *sapindas* in this sense, the rest are not so except in a secondary sense. And it is extremely doubtful whether the author of the Dáyabhága intended to apply the term to all the relations of the latter two classes: Srikrishna the commentator of the Dáyabhága and author of the Dáyakrama-Sangraha, however, refuses to call them *sapindas*.

Points not placed before the Full Bench.—The exposition of Sapinda relationship according to the Dáyabhága, set forth above, was made by the Full Bench as being what is logically deducible from the general expressions used by the author in the course of his arguments founded on the doctrine of spiritual benefit, whereby he maintained the particular *order of succession* of certain relations, as laid down by him, differing from the author of the Mitákshará.

There were however certain difficulties against his *oblation theory*, which stood in the way of the logical deduction of the principle of spiritual benefit from the generality of the

expressions, of which the author was fully conscious but which were neither argued at the bar nor considered by the Full Bench while enunciating what appeared to follow logically from the author's arguments in particular instances, as legitimate generalisations with respect to Sapinda relationship. The difficulties are these,—

1. The *oblation theory* is founded solely on two texts, one of Baudháyana, and the other, of Manu: (Texts nos. 3 and 4 pp. 50-51 *supra*). Baudháyana's text cannot be construed to support the theory unless the word *dáya* mean *pinda*. There is no authority in support of this novel meaning sought to be put upon it by Jímútaváhana; for, the plain natural meaning of the important passage is—"All these participating in *undivided heritage* are pronounced *sapindas*; those who participate in *divided heritage* are called *sakulyas*."

2. The author's interpretation is,—"All these partaking of *undivided oblations* are pronounced *sapindas*. Those who partake of *divided oblations* are called *sakulyas*."

Oblations may be said to be *undivided*, only on the occasion of performing the *sapindí-karana* ceremony on the first lunar anniversary of the day of a person's death, when four *pindas* are made, one for the deceased, and three for his three paternal ancestors, and the *pindas* are mixed up, thereby indicating that the soul of the deceased is to pass from the *preta-loka* or the region for the dead (purgatory), to the *pitri-loka* or region for the spirits of ancestors or heaven. But the oblations presented while the Párvana Sráddhas, the foundation of the doctrine of spiritual benefit, are performed,—are separate and divided and cannot be called *undivided*.

It is difficult to understand the meaning of the term *divided oblations*, whereby must be understood the *Pinda-lepas* or remnants of the *pindas i. e.* what are attached to the hand while mixing up the things, of which the *pindas* are composed, and scraped by the Kusa grass and formed into an offering for the three remoter ancestors. There is no reason why these should be called *divided oblations*, and why the three oblations presented to the three nearer ancestors, one to each, should be called *undivided oblations*.

3. According to the text of Manu (Text No. 4, p. 51 *supra*) oblations are to be presented to three ancestors, and not to six; there cannot be any doubt that Manu provides for the offering of *pindas* to the three paternal ancestors only, and not to the three maternal ancestors also.

And this is consistent with the provision that "the *fourth* is the giver of these offerings; the *fifth* has no concern with them." The terms *fourth* and *fifth* are used relatively to the remotest of the three ancestors. Hence it is clear that Manu cannot be taken to contemplate the offering of oblations by a person to his maternal grandfather, great-grandfather and great-great-grandfather; for, that person is undoubtedly *fifth* relatively to the remotest of the three maternal ancestors.

4. The Ancestor-worship like the worship of the Gods, is performed for the benefit of the worshipper and not for the benefit of the ancestors.

5. The doctrine of spiritual benefit derived from the performance of any Sráddha ceremony by a son or the like, is contrary to the doctrine of *Karma* and *Adrishta*, one of the fundamental principles of the Hindu religion, according to which a man's condition of happiness or misery depends solely on his own acts and omissions.

As to other objections against the doctrine of spiritual benefit derived from oblations, see Preface to the second Edition of the Dáyatattwa.

Jímútaváhana was well aware of the weakness of his position, and did therefore conclude by saying that if the learned are not satisfied with his *principle*, still the *order of succession* maintained by him should be accepted: D. B., Ch. xi, Sect. vi, Para. 33.

So it is the *order* and not the *principle*, which is of higher importance, according to the author himself. Hence the principle enunciated by the Full Bench does not appear to be justified.

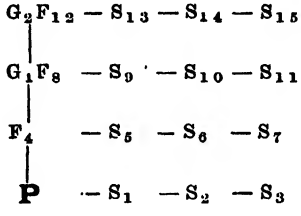
Sakulya.—The term *sakulya* means one belonging to the same *kula* or family, and designates two groups of heirs according to the Dáyabhága. The first group of *sakulyas* of a person comprises the 4th, 5th and 6th male descendants in the male line of that person, and of his father, grandfather and great-grandfather; and it includes the 4th, 5th and 6th paternal male ancestors in the male line, and also six male descendants in the male line of each of these ancestors; altogether thirty-three relations. The term *sakulya* therefore includes those male *sapindas* according to the Mitákshará, that do not fall under the first class Dáyabhága *sapindas* as enumerated above. The term *sakulya* is not used in the Mitákshará for denoting any class of heirs.

Besides the above meaning, the author of the Dáyabhága puts upon the term *sakulya* as used in Manu's text (No. 4.)

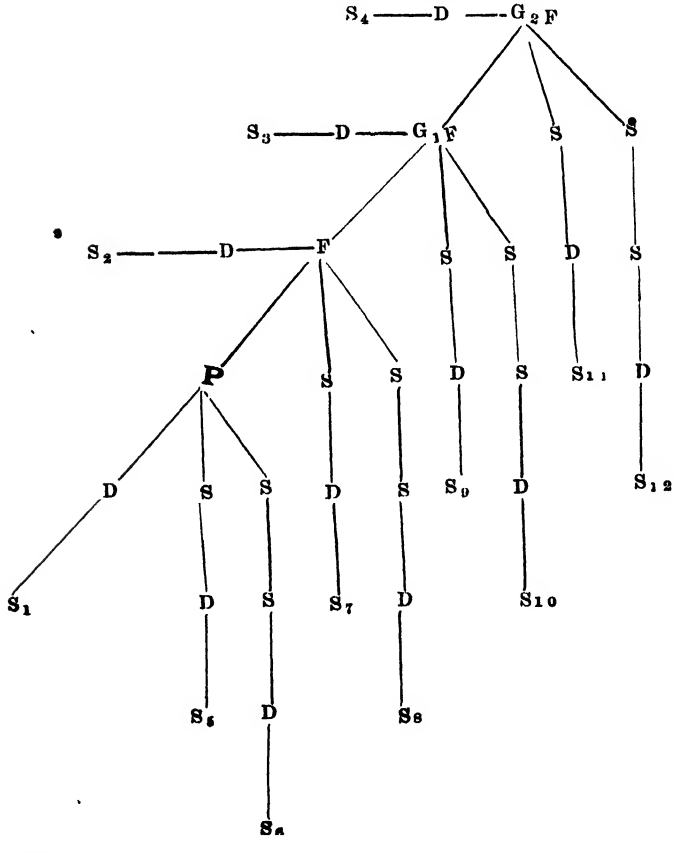
another sense in which it includes the group of heirs also called *samánodakas.*

The following tables will help you in understanding the *sapinda* and the *sakulya* relationships.

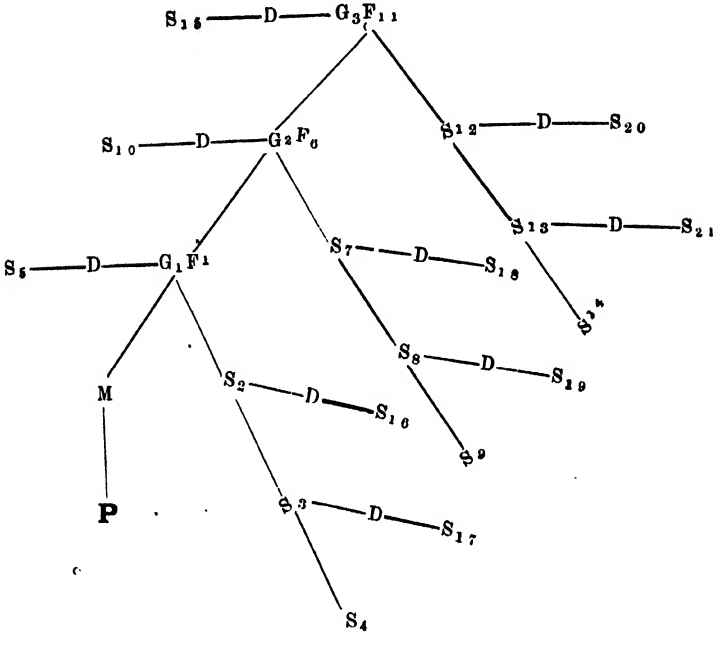
The first class *Dáyabhága sapindas.*



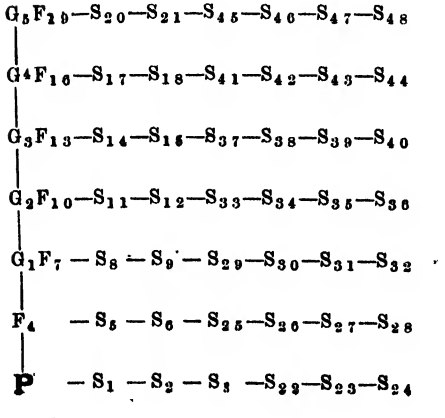
The second class *Dáyabhága sapindas.*



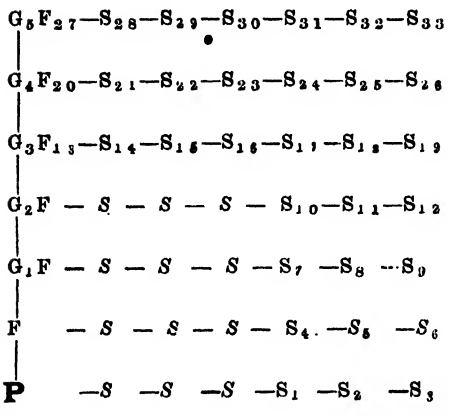
The third class *Dáyabhága sapindas.*



The *Mitákshará sapindas.*



The first group of *Sakulyas*.



Samanodakas.—The term *samánodaka* includes all agnatic relations of the same *gotra* or family, within fourteen degrees calculated according to the Hindu mode of computation ; that is to say, thirteen male descendants in the male line, thirteen similar ascendants, and thirteen similar descendants of each of these thirteen ascendants, excepting, however, those included under the terms *sapinda* and the first group of *sakulya*. According to some, it comprises all such *sagotras* or agnatic relations whose common descent and name are remembered. The meaning of the term *samánodaka* is the same as *sagotra*, in the Mitákshará : but in the Dáyabhága, it is limited as mentioned above.

Sagotras.—Two persons are *sagotra*, or of the same family, if both of them are descended in the male line from the *rishi* or sage, after whose name the *gotra* or family is called, however distant either of them may be from the common ancestor. Every Hindu knows the *gotra* to which he belongs.

The later Bráhmana writers say, that properly speaking Bráhmanas alone belong to some *gotra* or other, as being descended from the *rishi* who is the founder of the *gotra* or family ; but the three inferior tribes have no *gotra* of their own, their *gotra* being that of their Guru (preceptor of the Vedas) or priest. But this theory seems to be opposed to admitted facts. For Visvámitra, who was a Kshatriya by birth, and Vasishtha who was not a pure Bráhmana by birth, are admittedly founders of *gotras*, or ancestors of many founders of *gotras*.

Thus a text of Smriti cited by Raghunandana says :—

जमदग्नि-भरद्वाजो विश्वामित्रात्रि-गोतमाः ।
वशिष्ठ-काश्यपागस्त्या-मुनयो-गोत्रकारिणः ।
एतेषां यान्यपत्यानि तानि गोत्राणि मन्यते ॥

Which means,—"The sages—Jamadagni, Bharadvája, Visvámitra, Atri, Gotama, Vasishtha, Kásyapa, and Agastya—were progenitors of *gotras* : those that were descendants of these, are known to be the *gotras* or founders of *gotras*."

The fact that persons of different castes have the same *gotras*, rather proves that the caste system itself is a later institution or classification based upon occupations and qualifications,—a theory supported by many Sanskrit works of authority.

The samana-pravaras are descendants in the male line of the three paternal ancestors of the founder of a *gotra*. The term is used in the Dáyabhága, but not in the Mitákshará. Raghunandana cites the explanation given by Mádhava-A'chárryya of the term *pravara*, thus, प्रवरस्तु गोत्रप्रवर्त्तकस्य मुनेर्व्यावर्त्तको-मुनि-गणः, इति माधवाचार्यः ।—which means "Mádhava-A'chárryya says, that *pravara* is the group of sages distinguishing the sage who is the founder of a *gotra*." It seems that two different *gotras* may have the same name, and they are distinguished from each other by their *pravaras*, which term may also mean the most distinguished members of a *gotra*.

BANDHUS.

Bandhu.—The term *bandhu* is used in the Mitákshará, and not in the Dáyabhága, to designate a class of heirs ; and according to the Mitákshará, it means and includes, as I have already said, the *bhinna-gotra sapindas* or relations belonging to a different family. The meaning of the term *sapinda* is explained in the Mitákshará while commenting on the slokas of Yájnavalkya's Institutes, in which the qualifications of the damsel to be married by a man are dealt with. It is declared that the intended bride must, amongst others, be non-*sapinda*, must not belong to the same *gotra* or *pravara*, and must be beyond the fifth and the seventh degree from the mother and the father respectively : Texts Nos. 5, 6 & 7, *supra* pp. 51-55.

Meaning of Sapinda in Mitakshara.—In explaining the term non-*sapinda*, the Mitákshará says that the word *sapinda* means

one connected through the same body *i. e.*, any blood-relation however distant. It is observed that the husband and the *Patní* or lawfully wedded wife become *sapindas* to each other in this sense, because a text of revelation says that the sacrament of marriage unites them "bones with bones, flesh with flesh, and skin with skin." It is erroneous to say that they become *sapindas* through their child; for, if that were so, they should not be *sapindas* before childbirth, whereas the true theory is, that they become *sapindas* from the moment of their marriage.

After giving the above exposition, the Mitákshará says that wherever the word *sapinda* is used in that work, it should be understood in the sense of a blood-relation: Text No. 6, *supra* pp. 52-53.

The Mitákshará then goes on to observe that the qualification non-*sapinda* applies to all castes, but the qualification of not belonging to the same *gotra* or *pravara* applies to the regenerate classes only.

Sapinda relationship for Marriage.—It is next observed that in explaining the word non-*sapinda* it has been said that *sapinda* relationship means immediate or mediate connection through same body, but as such connection may be taken to exist between all persons, marriage itself would be impossible; hence, Yájnavalkya has declared that if the bride be "beyond the fifth and the seventh degree from the mother and the father respectively, she may be espoused." The Mitákshará adds that *sapinda* relationship should be taken to cease beyond those degrees, evidently meaning, for the purpose of marriage; because, this conclusion is arrived at as the proper construction of the text No. 5, which prohibits marriage of a *sapinda* damsel, but permits marriage of one if beyond five and seven degrees from the mother and the father respectively, though she be included under the term *sapinda* according to its ordinary meaning,—this conflict being reconciled by restricting in that way the meaning of the term Sapinda *in this text* of Yájnavalkya: and then explains the mode of computation of degrees (which I have already explained), and goes on to observe that the same mode should be adopted everywhere (*i. e.*, in all cases of contemplated marriage, or in all texts relating to degrees).

It should, however, be specially noted that the Mitákshará does not say whether or not, the lines of the seven and the five ancestors of the *propositus* on the paternal and the maternal sides respectively, may pass through males or females or both indifferently, although it is admitted on all sides that the lines of descent

from those ancestors may pass through males or females or both, without any distinction. But in illustrating the mode of computing the degrees, the Mitákshará refers only to the lines of the father's and the mother's male ancestors in the male line, though in computing five degrees the mother is counted as one.

Conflicting texts noticed.—The Mitákshará then cites a text of Vasishtha which says : "The fifth or the seventh from the mother and the father respectively (may be married),"—and a text of Paithínasi, which says: "(A girl may be taken in marriage, who is) beyond the third from the mother and the fifth from the father ; "—and explains these texts away by saying that they do not intend to authorize marriage of girls distant by lesser number of degrees (given in these texts) than in the above sloka of Yájnavalkya, but they intend to prohibit the espousal of the girls of nearer degrees indicated in them.

Reconciliation unsatisfactory.—The above mode of reconciliation, adopted by the Mitákshará does not appear to be satisfactory at all, nor is the view put forward by that treatise, respected and followed in practice. The customs and usages relating to the prohibited degrees for marriage, are so divergent in different localities, and among different tribes and castes, that it may be safely affirmed that as regards marriage, the written texts of law found in the Smritis and the Commentaries are nowhere followed in practice.

Conflicting rules on prohibited degrees.—If prohibited degrees for marriage be taken, as the standard of *sapinda* relationship, then it would extend to eight degrees on both the mother's and the father's side, according to Manu : to five and seven degrees (calculated from the mother and the father) respectively on the mother's and the father's side, according to Yájnavalkya ; to four and six degrees respectively on the mother's and the father's side, according to Vasishtha ; and to three and five degrees respectively on the mother's and the father's side, according to Paithínasi ; and to still lower degrees on the two sides according to the Vedic texts (*infra* p. 82) and according to custom prevailing in many places and among many classes of people.

It should be remarked that as damsels belonging to the same *gotra* are separately prohibited to the regenerate tribes for marriage, the *sapinda* girls on the father's side, who need be considered for the purpose of marriage among these tribes, are those that are cognate to the bridegroom, that is to say, between whom and the bridegroom females intervene. But as regards the Súdras who form the majority of Hindus, both

the agnate and the cognate *sapinda* damsels should be taken into consideration in this connection; for, they only are prohibited to the Súdras.

As regards the regenerate tribes the only rule of prohibited degrees for marriage, which seems to be followed in all parts of India, is that a damsel of the same *gotra* with the bridegroom is not taken in marriage.

Marriage usages, contrary to Sa'stras.—But it should be specially noticed that as regards prohibited degrees outside the *gotra*, that is to say, girls who are *bhinna-gotra sapindas*, or relations belonging to a different family, the usages are most divergent. We have already seen that the *Rishis* or lawgivers propound different rules on the subject. If we now turn to the actual practice observed by the people, we find that even among the Bráhmanas of Madras the *bhinna-gotra sapinda* relationship for marriage, extends only to two degrees from the mother: because, there they marry even their father's sister's daughter and their mother's brother's daughter. So also among the Chhatris or Rájputs claiming to be Kshatriyas, domiciled in Bengal and Chhota-Nagpur, very few cognate girls are eschewed for marriage. The reason appears to be, that when in a particular locality there are only a few families belonging to the same caste, so that the observance of the prohibited degrees as propounded in the Sástras, would render marriage itself impracticable for want of lawfully eligible brides, then we find a departure from the Sástras, to a greater or lesser extent, according to the exigency. The prohibited degrees are not observed also by the Kulin Bráhmanas of Bengal, whose so-called high position depends only on marriage of girls of certain families according to the modern and artificial rules of *Kulinism*, and who are often found to contract what may be called incestuous marriages for maintaining their *Kulinism* by disregarding the rules propounded by the Sástras, and explained by Raghunandana whose authority is respected in Bengal.

The golden rule of prohibited degrees—for marriage, to follow, therefore, in a case where the validity of a marriage is called into question on the ground of being within prohibited degrees, is to pronounce it valid if found to be celebrated in the presence and with the presumed assent, of the relations and caste people, notwithstanding written texts of law to the contrary, which must be taken to be recommendatory in character, as appears from the language of Manu's text on the subject:—

असपिण्डा च या मातु-रसगोत्रा च या पितुः ।
सा प्रशस्ता द्विजातीनां दारकर्मणि मैथुने ॥

Which means,—"She, who is non-*sapinda* also (non-*sagotra*) of the mother, and non-*sagotra* also (non-*sapinda*) of the father, is *commended* for the nuptial rite and holy union among the twice-born classes." Similarly, the Mitákshará expressly says that many of the qualifications of the bride, ordained by Yájnavalkya (Text No. 5, p. 51, *supra*) are directory only.

Prohibited degrees are not Bandhus for inheritance.—Thus you see, the prohibited degrees for marriage can by no means be taken to be *bhinna-gotra sapindas* or *bandhus* for the purpose of inheritance, on account of the following reasons :—

(1) While explaining *sapinda* relationship for the purposes of marriage, the Mitákshará says that wherever in that work the word *sapinda* is used, it shall be taken in the sense of one connected through the same body ; but it does not say that the restriction of *sapinda* relationship within seven degrees on the father's side and five degrees on the mother's side, which is undoubtedly laid down by Yájnavalkya for the purpose of marriage, is to be understood as applicable for all purposes :

(2) If the intention of the Mitákshará had been to apply the said restriction to inheritance and other purposes as well, it would not have explained the degrees of *sapinda* relationship again, while dealing with the *Párvana Srádddha*, and with Inheritance, by citing the text of Vrihat-Manu (Text No. 2), but would have referred to the earlier explanation of it given for marriage : Mit.,2, 5, 6 :

(3) The principles upon which marriage is prohibited between certain relations, are not the same on which inheritance is based :

(4) *Sapinda* relationship for marriage has reference only to *female* relations of the intended bridegroom, whereas *sapinda* relationship for inheritance relates mainly to male relations ; females, as a general rule, being excluded from inheritance :

(5) The proposition that if A can marry B's sister, then B cannot be A's heir, is not correct ; for a Bráhmana of Madras can marry his maternal uncle's daughter whose brother is expressly recognised as an heir, and Súdras can marry within the same *gotra*, a girl whose brother is a *samánodaka* and as such an heir :

(6) *Sapinda relationship for marriage* not being uniform but

divergent, as shown above, cannot be the basis of a rule of inheritance, which must be invariable, certain and uniform :

(7) There is neither authority nor reason for excluding a *bhinna-gotra* relation from inheritance when his relationship can be traced, seeing that the Mitákshará says that *bhinna-gotra sapindas* are included under the term *bandhus* declared heirs after *sagotras*, and that the term *sapinda* means any relation ; and seeing further that when the estate of a Bráhmana goes to his caste-people in default of *bandhus*, a very strong presumption arises against cutting down and confining the meaning of the term to some relations only, with a view to exclude others :

(8) These arguments and considerations for the purpose of establishing that the *prohibited degrees* for marriage are not *bandhus* for inheritance, would appear unnecessary and superfluous to a careful reader of the exposition given in the Mitákshará, of the *sapinda* relationship for marriage (Text No. 7, pages 53-55 *supra*) ; because, the Mitákshará distinctly says that the seven degrees on the father's side and the five degrees on the mother's side are to be computed from the *father* and the *mother* respectively : hence the six descendants of the father's seventh ancestor who is eighth from the *propositus* (in the Hindu mode of computation) are *sapindas* for marriage. But the eighth ancestor's descendants are admittedly not *sapindas* for inheritance ; for, the Mitákshará has explained *sapinda* relation for inheritance to extend to seven degrees from the *propositus*, and not from his father. This conclusively shows that the Sapinda relationship for marriage is inapplicable to inheritance.

Meaning of the word Bandhu.—Having regard to the structure and organisation of Hindu society founded upon the caste system, it appears that the Hindus have special reasons for attachment to even their most distant relations as well as to their caste-people. A well-known sloka says :—

उत्सवे व्यसने चैव दुर्भिक्षे राष्ट्रविप्लवे ।
राजद्वारे श्मशाने च य-स्तिष्ठति स बान्धवः ॥

Which means,—"He who stands by you, on the occasions of joy and distress, at a time of famine or of political revolution, and in the King's Court as well as in the cremation ground, is your *Bándhava* or relation."

Thus the agnate *sapindas* are *bandhus* or relations *par excellence*, and in this sense the word has been used in the text of

Vishnu, dealing with inheritance : see original text No. 2 under Mitákshará Succession. I should tell you that the words *bandhu* and *bándhava* are both derived from the root *bandh* = bind, and means any relation agnate or cognate. In Manu, Ch. ix, Slokas 159 and 160, the word *bandhu* has been used in the sense of *sagotra* or member of the same *gotra* : see original text No. 12 under Adoption. In the text of Yájnavalkya (ii, 135) dealing with the order of succession, the word *bandhu* has been used in the sense of a cognate, the agnates being denoted by the term *gotrajas* ; hence, it means cognates in the Mitákshará. But in many texts of the Smriti the term appears to be used in the sense of *sapinda* or *sagotra* or in the wider sense of a *relation.*

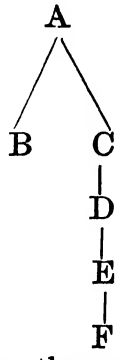
Conclusion as to who are Bandhus.—The conclusion, therefore, which appears to legitimately follow from the foregoing considerations, is, that the word *bandhu* in the Mitákshará means and includes either all cognate relations without any restriction, or at any rate, all cognates within seven degrees on both the father's as well as on the mother's side. This view, however, is opposed to an *obiter dictum* thrown out for the first time in the Full Bench case of *Umaid Bahadur* v. *Uday Chand,* I.L.R., 6 C., 110=6 C.L.R., 500, and repeated in the case of *Babu Lal* v. *Nanku Ram,* I. L. R., 22 C., 339.

Obiter dictum on Bandhus.—It is held by the Full Bench that a person's sister's daughter's son is his *bandhu* and heir, but it is added that his sister's daughter's son's son would not be his *bandhu* and heir. The question for consideration by the Full Bench was whether the sister's daughter's son is an heir ; but whether his son also is an heir, was not a matter for consideration by the Court in that case. The word *sapinda* was erroneously rendered into "kinsmen connected by funeral oblations of food," by Colebrooke in his version of the Mitákshará. This error was exposed by two learned oriental scholars, West and Bühler the former of whom was an eminent judge, in their valuable Digest of Hindu law, by giving a translation of portions of the passages of the Mitákshará, dealing with marriage, where the meaning of the term *sapinda,* and *sapinda* relationship for marriage, have been explained. The correct view was adopted in the case of *Lallubhai Bapubhai* v. *Mankurer Bhai,* I.L.R., 2 B., 422. The Calcutta Full Bench in their judgment in the above case followed this Bombay decision on that point, and then made the following observations :—

"The next question for consideration is, whether the defendant in the case that has been referred to us, stands in such a

relation to Mooktar Bahadur (the *propositus*) that they are each other's *sapindas* as defined by the author of Mitákshará in A'chára-Kánda."

Then proceeding to explain what is intended by the above passage, the facts of the case relating to relationship, are referred to, and then, the following table is given for illustration, and the same is elucidated as follows :—



"A is the common ancestor ; B, his son, is the *propositus* ; C, a daughter of A ; D, her daughter, both dead ; E is the son of D, and has a son F.

"Now B and E are *sapindas* to each other, but not B and F. Although F is within six degrees from the common ancestor, yet B, not being a descendant of the line of the maternal grandfather, either of F or of his father and mother, they are not *sapindas* to each other ; but B being a *sapinda* of E through his mother, they are *sapindas* of each other."

Dictum inexplicable.—I have not been able to find out anything in the A'chára-Kánda, in support of the above view : in fact, there is nothing anywhere in the Mitákshará which may justify the foregoing *dictum*. On the contrary, B being a relation on F's father's side and being within seven degrees, is a *sapinda* of F the circumstance of two females intervening cannot make any difference ; for, F is admittedly a *sapinda*, and E is not only a *sapinda* but also heir, of B. Bearing in mind that the word *sapinda* means a *relation* according to the Mitákshará, it is difficult to conceive any case in which A is B's *sapinda* and at the same time B is not A's *sapinda* : it seems to be opposed to common sense. This somewhat anomalous view appears to be due to the misapprehension of the meaning of the comments made by Visvesvara Bhatta and Bálambhatta on the text of Manu (see *supra*, Texts Nos. 4 and 9, pp. 51 & 55-6), as appears from the later judgment referred to above.

Neither Visvesvara Bhatta nor Bálambhatta has said anything which may justify the inference of the rule sought to be deduced from their verbal comments on Manu's text,—"To the nearest Sapinda, the inheritance next belongs",—which, according to the Mitákshará means,—"To the nearest *relation*, the inheritance next belongs." The Mitákshará takes the word

"*sapinda*" in this text of Manu, in its primary sense, namely, *relation*, whether *sapinda* technically so called, or *samánodaka*, or *sagotra*, or *bandhu*. The text is construed to lay down the rule of propinquity as the principle governing the order of succession among the said groups of heirs; see Text No. 8, p. 55 *supra*.

It is impossible to suppose that the commentators who profess to elucidate the Mitákshará, entirely ignored the interpretation put by its author on that text, and made comments on it, for the purpose of indicating, without expressing, a novel construction limiting its operation to the technically called *sapindas* alone, to be discovered by the Tagore Law Professor of 1880 (p. 569). If the word *sapinda* in that text means *any relation*, as is maintained by the author of the Mitákshará, how could the comments of Visvesvara and Bálambhatta, which are undoubtedly verbal in character, be taken to imply a rule of exclusion, upon the assumption that the term *sapinda* is used by them in the technically limited sense, when the author of the Mitákshará takes that term in its widest etymological sense, and when the commentators do not express dissent from the author's interpretation. And even if the commentators had differed from the author, though they in reality did not, how could their view be accepted while opposed to that of the author. The two commentators merely explain the meaning of the individual words of Manu's text, in a mode well-known to Sanskrit scholars, which is not the mode adopted for *construction of sentences*, as distinguished from *definition* or grammatical interpretation of the words composing sentences.

The aforesaid *obiter dictum* in *Umaid Bahadur's* case can be maintained, if the exposition by the comparatively recent commentators, of the prohibited degrees for marriage, be assumed as if given by the Mitákshará itself; and if it be further assumed, that in order that A a cognate may be heir of B as his *bandhu*, it is necessary that their relationship must be such, that A may marry B's sister, and also B may marry A's sister according to the said exposition of prohibited degrees.

The learned Hindu Judge who delivered the judgment of the Full Bench, seems to have consulted the said Tagore Professor, and embodied in it the Professor's own novel view which is unsupported by any authority, and is clearly erroneous as it is not justified by anything said by the two commentators of the Mitákshará, who never dreamt what is sought to be deduced from their language.

It has already been observed that, while explaining the mode of computing the five and the seven degrees from the mother and the father respectively, the Mitákshará does not say anything about the lines passing through males only, or through both males and females without any distinction. It is, however, clear that in counting five degrees from the mother, she is computed by the author as one degree, thus indicating that although each link is called a *purusha* which means a generation, but which also means a male, still that word is not to be taken to imply exclusion of females: thus when the Mitákshará does not lay down any restriction, it may be taken that according to that treatise the lines may pass through both males and females, or either.

But the recent commentators confine the upward lines to male ancestors only, although the downward lines according to them, may pass through males and females, or either; and although the upward lines of the five and the seven ancestors from the mother's and the father's *bandhus*, are computed by them by taking the female ancestor as one degree. No reason is assigned by them for this distinction.

The reason which induced the recent commentators to construe the texts permitting marriage beyond five and seven degrees from the mother and father respectively, as meaning the exclusion of the female descendants of only the six and the four *male* ancestors of the father and the mother respectively—appears to be, to prevent the prohibited degrees from becoming too large.

They have confined the prohibited degrees to the descendants of only four lines of male ancestors, namely, the father's and the mother's male ancestors as stated above, and the father's five maternal male ancestors, and the mother's three maternal male ancestors.

The latter two lines of ancestors are deduced in a curious manner, from the following text of Nárada on prohibited degrees,—

आसप्तमात् पञ्चमाच्-च बन्धुभ्यः पितृमातृतः ।
अविवाह्या सगोत्रा च समान-प्रवरा तथा ॥ १२, ७ ॥

Which means,—

"A damsel within the seventh and the fifth (degrees) from among the *bandhus* on the father's and the mother's sides,

should not be espoused, likewise also one of the same *gotra*, and one of the same *pravara*".

The term *bandhus* in this text undoubtedly means *sapindas*, inasmuch as this text cannot but be held to lay down prohibited degrees such as are ordained by other sages; and it would be perfectly consistent with other texts, only by putting that meaning on the word. It cannot surely be contended that Nárada does not prohibit *sapindas* at all, by taking the word *bandhus* in the limited sense of the three cognate first cousins of the parents, that are enumerated as their *bandhus* in the text cited in the Mitákshará chapter 2, section 6, para. 1, upon the assumption that the enumeration of *bandhus* in that text is *exhaustive*.

The recent commentators, however, have taken the word in that limited sense, and have deduced from Nárada's text the prohibition of six descendants of the father's five maternal ancestors, and of four descendants of the mother's three maternal ancestors, in a way which will be explained in the Chapter on Marriage.

Now, it is worthy of special notice that the prohibited degrees are thus ascertained, upon the footing that the enumeration of *bandhus* in the text referred to above,—is *exhaustive*, and not illustrative. How can then the prohibited degrees so ascertained, be reasonably relied on, for ascertaining who are *bandhus* upon the contrary footing that the said enumeration is *not exhaustive*, but is merely illustrative.

It is difficult to understand why F & B in the above table are not *sapindas* to each other. It appears to be admitted that F is *sapinda* to B, but it said that B is not *sapinda* to F. Bearing in mind that one is *sapinda* to another, if they are connected through particles of one body, it seems to be a contradiction in terms, to say that F is *sapinda* to B, but B is not *sapinda* to F. The reason assigned being that B not being a descendant of the line of the maternal grandfather of F or of his father and mother, they are not *sapindas* to each other. But it is not explained why, being such a descendant, is the *sine qua non* of mutual *sapinda* relation.

The real reason appears to be, that although B could not marry F's sister, still F could marry B's sister according to the recent commentators: because, the descendants of the father's mother's maternal ancestors, are not, according to them, included within prohibited degrees.

But according to the Mitákshará, F could not marry B's

sister; because, she being a relation on F's father's side, and within seven degrees, is a *sapinda* for marriage. The two females C and D form two degrees whether they be in the descending line relatively to B, or in the ascending line relatively to F; but according to the dogmatic view of the recent commentators, they cannot be so in the latter case.

Hence the *bhinna-gotra sapindas*, or *sapindas* of a different *gotra*, who are *bandhus* according to the Mitákshará, cannot reasonably be restricted in the manner maintained by the Tagore Law Professor of 1880 without any authority excepting his own erroneous novel construction of the verbal comments made by the two commentators of the Mitákshará, on Manu's text.

Village Community, and the above terms.—It may be interesting to enquire into and trace the etymological meaning of some of the terms, and the probable connection of the same with the Village Community System, and with their explanation as given above. The words *sapinda*, *sakulya*, *samánodaka*, *sagotra* and *samána-pravara* mean, respectively, those whose *pinda*, *kula*, *udaka*, *gotra* and *pravara* are common. *Gotra* is derived from *go* a cow and *trá* to protect, and means that which protects the cow, such as a pasturage; *Udaka* is water or a reservoir of water such as a tank or well; *Kulya* may be derived from *kula* (similar to Latin *colo*) to cultivate, and means a field or cultivated land; and *pinda* means food.

According to the rules laid down by Manu (8,237-239) and Yájnavalkya (2, 166-167) relating to the establishment of villages, there should be a belt of uncultivated land, set apart for pasture, at least four hundred cubits in breadth, immediately round that part of a village, where the dwelling houses are situated, separating the same from the cultivated land; and on that side of this belt, which is contiguous to the fields, hedges should be erected so high that a camel might not see over them, so that the cattle might not trespass into the fields.

Assuming that a single family established a new village, and bearing in mind that pasturage, and a reservoir of water indispensable in a tropical country, are not divisible according to Hindu Law, we may take the words *sagotra* and *samánodaka* to mean all members of the family, holding in common the pasturage and the reservoirs of water used for domestic or agricultural purposes; the word *sakulya* to signify those members that jointly carried on cultivation; and the word *sapinda* to comprise those that lived in common mess. When a family increased in the number of its members, they would

separate in mess first, and might still continue to hold in common their *kulya* or property, consisting mainly of land, by jointly carrying on the cultivation and dividing the produce according to their shares; and when this was felt to be inconvenient, they divided the family land, continuing, however, to use and occupy jointly the *gotra* or the land reserved for grazing the cattle, and the *udaka* or reservoirs of water, which remained common to the most distant agnatic relations. The plain meaning of the texts of Baudháyana and of the Brahma-Purána cited above, lends some support to this view.

CHAPTER III.

MARRIAGE.

ORIGINAL TEXTS.

१। 'असपिण्डा च या मातुरसगोत्रा च या पितुः।
सा प्रशस्ता द्विजातीनां दारकर्म्मणि मैथुने ॥ मनुः ३, ५।

(The Mitákshará, however, reads the first line of this text thus :—
असपिण्डा च या मातुरसपिण्डा च या पितुः।)

सपिण्डता तु पुरुषे सप्तमे विनिवर्त्तते।
समानोदकभावस्तु जन्मनाम्नोरवेदने ॥ मनुः ५, ६०।

1. She, who is the mother's non-*sapinda* also (non-*sagotra*), and the father's (non-*sagotra*) also (non-*sapinda*), is commended for the nuptial rite and holy union amongst the twice-born classes.—Manu iii, 5.

(According to the reading of this text, adopted by the Mitákshará it would mean :—She, who is non-*sapinda* of the mother, and also non-*sapinda* of the father, is &c.)

But *sapinda* relationship ceases in the seventh degree (from the mother and the father); and the *Samánodaka* relationship ceases if (common) descent and name be not known.—Manu v, 60.

२। न सगोत्रां न समान-प्रवरां भार्य्यां विन्देत।
मातृत-स्वापञ्चमात् पुरुषात् पितृत-स्वासप्तमात् ॥
विष्णुः—२४, ९-१०।

2. Let not a damsel be married who is of the same *gotra*, or of the same *pravara*, or within the fifth degree on the mother's side, or within the seventh on the father's side.—Vishnu, xxiv, 9-10.

३। अविप्लुत-ब्रह्मचर्य्यो लक्षण्यां स्त्रियम् उद्वहेत्।
अनन्य-पूर्विकां कान्ताम् असपिण्डां यवीयसीं।
अरोगिणीं भ्रातृमतीम् असमानार्ष-गोत्रजाम्।
पञ्चमात् सप्तमाद् जातां मातृतः पितृतस्तथा॥

याज्ञवल्क्यः—१, ५२-५३।

3. Let a man who has finished his studentship, espouse an auspicious wife who is not defiled by connection with another man, is agreeable, non-*sapinda*, younger in age and shorter in stature, free from disease, has a brother living, is born from a different *gotra* and *pravara*, and is beyond the fifth and the seventh degrees from the mother and the father respectively.—Yájnavalkya, i, 52-53.

४। पञ्चमीं सप्तमीञ्चैव मातृतः पितृतस्तथा। मिताक्षराधृत-वशिष्ठवचनं।

4. (A man may espouse a damsel who is) the fifth and the seventh (in degree) on the mother's and the father's side respectively.—Vasishtha cited in the Mitákshará while commenting on Yájnavalkya, i, 53.

५। आसप्तमात् पञ्चमाच्च बन्धुभ्यः पितृमातृतः।
अविवाह्या सगोत्रा च समान-प्रवरा तथा॥—नारदः १२, ७।
सप्तमे पञ्चमे वापि येषां वैवाहिकी क्रिया।
ते च सन्तानिनः सर्व्वे पतिताः शूद्रतांगताः॥ नारदः—रघुनन्दनधृतः।

5. A damsel within the seventh and the fifth (degrees) from among *bandhus* (= relations or *sapindas*) on the father's and the mother's sides respectively, should not be married, likewise one of the same *gotra*, and one of the same *pravara*. (Nárada xii, 7). Those among whom marriage rite takes place within the seventh and the fifth (degrees) respectively, they all with their offspring become degraded and reduced to the position of Súdras.—Nárada cited by Raghunandana.

६। असमानार्षेयीं कन्यां वरयेत्, पञ्च मातृतः परिहरेत् सप्त पितृतः,
त्रीण् मातृतः पञ्च पितृतो वा। पैठीनसिः।

6. Shall espouse a damsel not belonging to the same *gotra* shall avoid five (degrees) on the mother's side, and seven on the father's; or three (degrees) on the mother's side and five on the father's.—Paithínasi cited in the Mitákshará and by Raghunandana.

७। मातृपितृसम्बन्धाः आसप्तमाद्-अविवाह्याः कन्या भवन्ति, आपञ्चमाद्-अन्येषां मतं, सर्व्वाः पितृपत्न्यो मातरः, तद्भ्रातरस्तु मातुलाः, तद्दुहितरो भगिन्यः, तदपत्यानि भागिनेयानि, ताश्चाविवाह्याः, अन्यथा सङ्कर-कारिण्यः, तथाध्यापयितुरेतदेव ॥ रघुनन्दनधृत सुमन्तुवचनं ॥

7. Damsels connected on the mother's or the father's side shall not be taken in marriage, up to the seventh degree; up to the fifth degree, is the opinion of others: all the wives of the father are mothers, their brothers are maternal uncles, their daughters are sisters, their daughters are nieces, they too shall not be married, otherwise they would cause disorder; this applies also to the daughter of the *preceptor*.—Sumantu cited by Raghunandana.

८। असम्बद्धा भवेद् या तु पिण्डेनैवोदकेन वा।
सा विवाह्या द्विजातीनां त्रिगोत्रान्तरिता च या ॥ बृहन्मनुः।

8. She, who is not connected by *pinda* or water, is fit for marriage among the twice-born classes, as also she who is distant by three *gotras*.—Vrihat-Manu cited by Raghunandana.

९। आयाहीन्द्र पथिभिरीलितेभि-र्यन्नम् हवं नो, भागधेयं जुषस्व।
हवां जहुर्मातुलस्येव योषा भागस्ते पैतृष्वसेयी वपाम् ॥ वेदः।

9. Indra! Come by paths that are praised, to this our sacrifice, accept the offering; well-cooked meat is offered (by us to thee), which is thy due, as (one's) maternal uncle's daughter or father's sister's daughter (is his due). Veda.

१०। तस्माद् वा समानाद् एव पुरुषाद् अत्ता चाद्यश्च जायते।
उत तृतीये सङ्गच्छावहै चतुर्थे सङ्गच्छावहै ॥ वाजसनेयके।

10. From the very same common stock are descended the enjoyer (husband) and the enjoyed (wife): we marry in the third or we marry in the fourth (degree).

११। त्रिंशद्वर्षो वहेत् कन्यां हृद्यां द्वादशवार्षिकीं।
त्र्यष्टवर्षोऽष्टवर्षां वा धर्म्मे सीदति सत्वरः ॥ मनुः—९।९४।

11. Let a man of thirty years marry an agreeable girl of twelve years, or a man of thrice eight years, a girl of eight years; one marrying earlier deviates from duty, (or one may marry earlier to prevent failure of religious rite).—Manu, ix, 94.

१२। प्राप्ते द्वादशमे वर्षे यः कन्यां न प्रयच्छति।
माता चैव पिता चैव ज्येष्ठो भ्राता तथैव च।
त्रयस्ते नरकं यान्ति दृष्ट्वा कन्यां रजस्वलां॥
यस्तां विवाहयेत् कन्यां ब्राह्मणो मदमोहितः।
असम्भाष्यो ह्यपाङ्क्तेयः स विप्रो वृषलीपतिः॥ यमः २२, २३।

12. If a girl be not given in marriage when she has reached the twelfth year, her mother and father as well as her elder brother, these three go to the infernal regions having seen her catamenia before marriage. That Bráhmana who being blinded by vanity espouses such a girl should not be accosted, and should not be allowed to sit at a feast in the same line with Bráhmanas; for, he is deemed the husband of a Súdra wife.—Yama, 22, 23.

१३। प्राग् रजोदर्शनात् पत्नीं नेयात् गत्वा पतत्यधः।
व्यर्थीकारेण शुक्रस्य ब्रह्महत्याम् अवाप्नुयात्॥ निर्णयसिन्धुधृत-
आश्वलायनवचनं।

13. (A man) shall not approach the wife before the appearance of catamenia; approaching, becomes degraded, and incurs the sin of slaying a Bráhmana by reason of wasting the virile seed.—A'svaláyana cited in the Nirnayasindhu.

१४। पिता पितामहो भ्राता सकुल्यो जननी तथा।
कन्याप्रदः पूर्व्वनाशे प्रकृतिस्थः परः परः॥
अप्रयच्छन् समाप्नोति भ्रूणहत्याम् ऋतावृतौ।
गम्यं त्वभावे दातॄणां कन्या कुर्य्यात् स्वयंवरं॥ याज्ञवल्क्यः १,६३-६४।

14. The father, the paternal grandfather, the brother, a *sakulya* or member of the same family, the mother likewise; in default of the first (among these) the next in order, if sound in mind, is to give a damsel in marriage; not giving, becomes tainted with the sin of causing miscarriage at each of her courses (before marriage); in default, however, of the (aforesaid) givers, let the damsel herself choose a suitable husband.—Yájnavalkya, i, 63-64.

१५। पिता पितामहो भ्राता सकुल्यो मातामहो माता चेति कन्याप्रदः
पूर्व्वाभावे प्रकृतिस्थः परः परः। विष्णुः २४,३८-३९।

15. The father, the paternal grandfather, the brother, a *sakulya*, the maternal grandfather and the mother; in default of the first among

these, the next in order, if sound in mind, is the giver of a maid in marriage.—Vishńu, xxiv, 38-39.

१६। पिता दद्यात् स्वयं कन्यां भ्राता वानुमते पितुः ।
मातामहो मातुलश्च सकुल्यो बान्धवस्तथा ।
माता त्वभावे सर्व्वेषां प्रकृतौ यदि वर्त्तते ।
तस्याम् अप्रकृतिस्थायां कन्यां दद्युः स्वजातयः ॥ नारदः १२,२०-२१ ।

16. The father himself shall give a girl in marriage, or with his assent the brother, the maternal grandfather and maternal uncle, and a *sakulya*, a *bándhava* likewise; on failure of all, however, the mother, if she is in sound mind; if she be not in sound mind, the people of the same caste shall give a damsel in marriage.—Nárada, xii, 20-21.

१७। पिता रक्षति कौमारे भर्त्ता रक्षति यौवने ।
पुत्रो रक्षति वार्द्धक्ये न स्त्री स्वातन्त्र्यमर्हति ॥ मनुः ९, ३ ।

17. A woman is not entitled to independence: her father protects her in her maidenhood, her husband in her youth, and her son in her old age.—Manu, ix, 3.

१८। रक्षेत् कन्यां पिता, विन्नां पतिः, पुत्रश्च वार्द्धके ।
अभावे ज्ञातयस्तेषां न स्वातन्त्र्यं क्वचित् स्त्रियाः ॥ याज्ञवल्क्यः १,८५।

18. A woman is never entitled to independence: let the father protect her when maiden, the husband when married, the son when old, and in their default their kinsmen.—Yájnavalkya, i, 85.

१९। कन्या वरयते रूपं माता वित्तं पिता श्रुतं ।
बान्धवाः कुलम् इच्छन्ति मिष्टान्नम् इतरे जनाः ॥

19. The bride is anxious for beauty, her mother for wealth, her father for education, her relations for family honour (in the bridegroom), and all the rest for a sumptuous feast.

२०। यस्मै दद्यात् पिता त्वेनां भ्राता वानुमते पितुः ।
तं शुश्रूषेत जीवन्तं संस्थितञ्च न लङ्घयेत् ॥
मङ्गलार्थं स्वस्त्ययनं यज्ञश्चासां प्रजापतेः ।
प्रयुज्यते विवाहेषु, प्रदानं स्वाम्यकारकं ॥ मनुः, ५, १५१-२ ।

20. To whom the father has given her, or the brother with the father's assent, him shall she serve while he is alive; and shall not disregard (her duties to him) when dead.

The recitation of the benedictory sacred texts, and the sacrifice (with Homa in the nuptial fire) in honour of (the God) Prajápati (= Lord of creatures.) are used in marriages, for the sake of procuring good fortune (to the brides); but the gift (by the father) is the cause of the status of husband (or the marital dominion of the husband). Manu, v, 151-152.

२१। पाणिग्रहणिका मन्त्राः कन्यास्वेव प्रतिष्ठिताः।
नाकन्यासु क्वचिन्-नृणां लुप्तधर्मक्रिया हि ताः॥
पाणिग्रहणिका मन्त्राः नियतं दारलक्षणं।
तेषां निष्ठा तु विज्ञेया विद्वद्भिः सप्तमे पदे॥ मनुः, ८, २२६ ७॥

21. The sacred nuptial texts are applied solely to virgins, and not, among people anywhere, to non-virgins, since these are excluded from religious rites. The sacred nuptial texts are the certain cause of the sacrament of marriage; their completion is known by the learned to be on the seventh step.– Manu, viii, 226-227.

MARRIAGE.

Marriage necessary according to Sastras, exceptions.—The institution of marriage which is the foundation of the peace and good order of society, is considered as sacred even by those that view it as a civil contract. According to the Hindu Sástras it is more a religious than a secular institution. It is the last of the ten sacraments or purifying ceremonies. The Sástras enjoin men to marry for the purpose of procreating a son necessary for the continuation of the line of paternal ancestors and for the spiritual benefit of their and his souls. According to our Sástras a man may not at all enter into the order of householder, or the married life, but may choose to continue a life-long student when he is desirous of *moksha* or liberation from the necessity of transmigration of souls, or in other words, the necessity of repeated deaths and births. But you must not mistake for life-long students all bachelors, most of whom do not marry, not because they are averse to the pleasures of marriage, but because they are unwilling to take upon themselves the responsibilities of conjugal life. These do not bear the remotest resemblance to the life-long students that are to lead the austere life of real celibacy.

Marriage in ancient law, and the religious principle.—In ancient times marriage involved the idea of the transfer of

dominion over the damsel, from the father to the husband. Slavery, or the proprietary right of man over man, was a recognised institution among all ancient nations, and it appears to have owed its origin to the *patria potestas* or the father's dominion and unlimited power over his child. A daughter was an item of property belonging to her father who could therefore transfer her by sale, gift or other alienation, like any other property; and marriage consisted in the transfer, in any one of the said modes, of the parental dominion over the bride, to the bridegroom who acquired by the transaction, the marital dominion over her. Marriage by capture was also based on the same principle. The condition of a slave, a wife, and a son or daughter, was similar in ancient law, and founded on the same principle of absolute dependence on the one side, and of unlimited power, extending to even that of life and death, on the other. The earliest and common form of marriage was the sale of the bride for a price paid to her father by the bridegroom. The father's choice in the matter was under such circumstances likely to be influenced more by the amount of the price offered, than by a consideration of the alliance being beneficial to the daughter.[e] This purely selfish and secular principle became in course of progress, repugnant to refined feelings, and the Hindu sages sought to establish the altruistic and religious principle as the only guide for the father's selection, by laying down that the free gift, of a daughter decked with dress and ornaments, to a suitable husband to be found out by him, without any other consideration than her happiness, is an imperative religious duty imposed on the father,—and by condemning the existing practice of marriage by sale in consideration of the *sulka* or bride's price, as being unworthy of persons having a sense of spiritual responsibility, and a pretension to purity, whose conduct should be characterised by higher principles, although that practice might be allowed to Súdras among whom purity of conduct could not be expected.

Religious and secular marriages.—Accordingly the Hindu sages divided marriages into eight kinds for the purpose of distinguishing those that are approved on account of there being no improper motive on the part of any person concerned in them and are therefore declared to be religious, from those that are condemned on some ground or other, and are therefore disapproved and pronounced to be irreligious. In the marriage called **Bráhma**, the father or other guardian of the bride has to make a *gift* of the damsel adorned with dress and

ornaments to a bachelor versed in the Brahma or Veda, and of good character, who is to be sought out and invited by the guardian, to accept the bride offered to him. In the Daiva marriage the damsel is given to a person who officiates as a priest in a sacrifice performed by the father, in lieu of the Dakshiná or fee due to the priest; it is inferior to the Bráhma because the father derives a benefit, which being a spiritual one is not deemed reprehensible. Still inferior is the A'rsha marriage in which the bridegroom makes a present of a pair of kine to the bride's father, which is accepted for religious purpose only, otherwise the marriage must be called A'sura described below. Another kind of approved marriage is called Prájápatya which does not materially differ from the Bráhma, but in which the bridegroom appears to be the suitor for marriage and he may not be bachelor, and in which the gift is made with the condition that "you two be partners for performing secular and religious duties." These are the four kinds of marriage, the male issue of which confers special spiritual benefit on the ancestors.

The four disapproved and censured kinds of marriage are the Gándharva, the A'sura, the Rákshasa, and the Paisácha. The Gándharva marriage, which is not disapproved by some sages, appears to be the union of a man and a woman by their mutual desire, and to be effected by consummation; this seems to be inconsistent with the father's *patria potestas* over the damsel, and it appears to relate either to cases where a damsel had no guardian, or to cases where consummation by mutual desire had already taken place, and the law requires that the father should give his assent to the daughter's marriage with the man. The A'sura marriage amounted to a sale of the daughter: the Sulka or the bride's price was the moving consideration for the gift by the father, of the daughter in marriage. The Rákshasa was marriage by forcible capture, allowed only to the Kshatriyas or military class. The Paisácha marriage was the most reprehensible, as being marriage of a girl by a man who had committed the crime of ravishing her either when asleep or when made drunk by administering intoxicating drug. You must not think that this is an instance in which fraud is legalized by Hindu law; the real explanation appears to be that chastity and single-husbandedness were valued most, and so the Hindu law provided that the ravisher should marry the deflowered damsel. It appears, therefore, that the Gándharva and the Paisácha marriages were preceded and caused by sexual intercourse, in the first case

with the consent of the girl, and in the second by fraud. The A'sura and the Gándharva seem to resemble respectively the *Co-emptio* and the *Usus* in Roman law which, however, positively forbade the Paisácha marriage.

The Hindu ideal of marriage is, that it is a holy union for the performance of religious duties; hence, where the sexual pleasure is the predominant idea in the mind of a party to it, it is disapproved and is condemned as a secular marriage, as distinguished from that in which the religious element prevails. The custom of marriage of girls before puberty proves that the idea of sexual pleasure is not associated with the holy nuptial rite of the Hindus. The legal consequences of the approved and the condemned marriages, are different; a wife married in an approved form becomes a *Patní*, but one espoused in the disapproved form does not become a *Patní*. According to the Mitákshará a *Patní*, or the lawfully wedded wife, or the indispensable associate for religion, becomes his *sapinda*, and may become his heir, and her husband also may become her heir: whereas a wife who is married in a disapproved form and consequently does not become *Patní*, does not become her husband's *sapinda*, and cannot inherit from her husband, nor can he inherit from her. This distinction, however, is not recognised by our courts, and wives espoused in the A'sura marriage which though disapproved is still prevalent among many classes of Hindus, enjoy the rights of a *Patní* or lawfully wedded wife.

It should be remarked that these eight kinds of marriage are not really eight different *forms* of marriage, as they are loosely called; the form appears to be the same in all cases except perhaps in the Gándharva and the Rákshasa, namely, the gift and acceptance of the damsel, coupled with religious rites which are necessary and more multiplied in the approved ones. This form of gift and acceptance seems to be observed even by Christians, among whom it is undoubtedly a survival.

Definition of marriage, and marriage without consent.— Marriage is defined by Raghunandana to be the acceptance by the bridegroom, of the bride, constituting her his wife. The bride is not, in one sense, a real party to the marriage which is a transaction between the bridegroom and her guardian, in which she is the subject of the gift. The expression 'bride's marriage' is said to be a figurative one. The Hindu law vests the girl absolutely in her parents and guardians by whom the contract of her marriage is made, and her consent or non-consent is not taken into consideration at all: I.L.R., 21 B., 29. According to

the sages a man has to choose a damsel agreeable to himself for his wife, and the lowest age for his marriage is twenty-four. But contrary to the Sástras a custom has grown up according to which marriages are negotiated by the guardians of the bridegrooms and are celebrated at an earlier age; and excepting in a few instances, the real parties to the marriage see each other for the first time, when they are actually passing through the ceremony of wedlock. But nevertheless it is an indisputable fact that in the majority of instances Hindu marriages, though thus contracted, do not prove to be unhappy ones.

Justification of marriage without express consent.—There are many persons who being dazzled and blinded by the material civilization and the political greatness of the European nations, consider their social institutions to be superior to those prevalent amongst the Hindus whose political degradation is attributed by them to the assumed inherent inferiority of their social organization and also of their religion. Marriage by mutual consent of grown up men and women is what prevails among the Christian nations of Europe, and is on that account thought to be the most civilized and proper form; whereas the contrary is the rule in India, which is therefore taken to be a barbarous usage and an evil of a grave character. The Hindus, however, say that when you cannot have your mother and father, your brother and sister, or any other relation, according to your choice, why then should you have a wife or a husband according to your own choice? If all other dear and near relations are yours without your choice, you may as well have a wife or a husband dear to you though chosen by others; and this is conclusively proved by what you find in Hindu society. The alleged superiority again of marriage by mutual consent, is negatived by the fact of there being so many divorces and separations, showing that union by choice is not the condition of the happiness of married life. As for political greatness and degradation, there are pious men who would say that the height of the political greatness of a nation is often the measure of the depth of its religious degradation; for the attainment of worldly prosperity by one nation is frequently accomplished at the expense of others, and, therefore, by transgressing the rules of religion.

Early marriage of Hindu girls, father's duty.—It is a religious duty imposed by the Hindu Sástras upon the father or other guardian of a damsel, that she should be disposed of in marriage at a tender age not earlier than the eighth year, but before the signs of puberty make their appearance. The reason

of the rule appears to be three-fold. The first is,—that marriage should be contracted from a sense of religious duty, and not from a desire of sexual pleasure, and so the immediate gratification of it is made impossible. The second is,—that by marriage a girl becomes not only the partner in life of her husband, but becomes a member of the joint family to which her husband belongs ; and that, therefore, being admitted into the family at a tender age when her mind and character are yet unformed, and placed amidst the associations and peculiarities of the family of her husband, she becomes assimilated to it, upon which she is, as it were, engrafted in the same way as a member born in it. The third reason is,—the anxiety felt by the Hindu legislators for securing the chastity of females, which is the foundation of the happiness of home, of the belief in the reality of the family tie and relationship, and of the mutual love and affection of the relations towards each other based thereon, which are so prominent in Hindu society. The two strongest propensities to which man in common with the lower animals is subject, are the desire for food and the desire for offspring. With the first he is born, and the second manifests itself later on at a certain stage of development : and marriage of a damsel before that age is strictly enjoined, so that her mind may be concentrated on her husband alone as the means for the gratifications of that appetite. And it cannot but be admitted that in the generality of cases the attachment that grows up between the husband and the wife is of the strongest kind, and the devotion of Hindu wives to their husbands is unparalleled.

It should, however, be particularly noticed that while the Hindu sages enjoin the early marriage of females, they do at the same time, condemn in the strongest terms, the premature consummation of the same : (Text No. 13).

I have already told you that according to modern practice even the bridegroom is a mere passive agent in marriage. Our Sástras, however, appear to lay down that he should be a free agent in this matter, and contract it at a mature age when he is in a position to fully understand the responsibilities of conjugal life.

Early marriage such as at present prevails in our society is considered as an evil by many 'educated' Hindus. Some condemn the early marriage of females on the ground that it may lead to premature consummation. Others disapprove of early marriage of the young men that are prosecuting their studies as students. They do really condemn the modern practice in so far as it is contrary to the Sástras.

Objections to two rules of marriage, considered.—Exception, however, is taken to the two rules of the Sástras, the first of which imposes the duty on the father or other guardian of girls, of providing them with suitable husbands before puberty ; and the second of which enjoins all men to enter into matrimony.

The objection to the first rule has arisen from the fact that the observance of the rule entails ruin upon fathers of daughters in consequence of the heavy expenditure they are compelled to incur in disposing of their daughters in marriage. A most pernicious custom has been growing up in our society according to which bridegrooms are becoming marketable things, and extortionate demands are made by their guardians, that are to be satisfied by the bride's father in order to bring about the marriage The custom owes its origin to the vanity of the Calcutta people, but it is gradually extending its mischievous influence over the Muffassil. It is detrimental to the best interests of the Hindu community, and directly or remotely it affects every member of Hindu society, not excepting those that blinded by a short-sighted policy believe themselves to be gainers. The good sense of the Hindu community seems to have left them altogether, as in a matter of such vital importance to their society they do not exert themselves and make any efforts to put down the growth of this reprehensible custom.

The objection to the second rule is of a very serious character. By the contact with Western civilization the ideas regarding comforts have expanded amongst all classes of people, 'educated' or not ; the simplicity in the habits of Hindu life is passing away ; and marriage is almost come to be regarded as a luxury, its responsibilities having become heavier than before. To the early and improvident marriages is attributed the want of self-respect, self-reliance, independence and enterprising spirit, that, in one sense, characterises the Hindus, and that is thought to have led to their present political degradation.

The Hindu civilization and the Western civilization are different in character and somewhat opposed to each other. The western civilization is directed to the promotion of the happiness and prosperity in this world, of the people of the different localities respectively, that constitute different political states. Whereas Hindu civilization is directed to the attainment of happiness in the next world in the true sense of the term. For according to the Christian belief, their next world is not to commence until doomsday ; while according to the Hindu belief, it commences immediately after death, when the human

soul attains liberation or eternal beatitude, or assumes another heavenly or earthly body, according to its merits and demerits. The Hindus are therefore more religious than worldly. Self-abnegation, self-sacrifice and self-humiliation are necessary for the attainment of their religious aspiration, and the passiveness, the mildness, the tenderness and the dependent spirit of the Hindus, are the effects of their institutions moulded in a way calculated to subserve that purpose.

The great question, therefore, relates to the *summum bonum* and the mode of its attainment, and the continuance of our institutions depends upon its solution, or rather upon the belief in this respect.

It cannot but be admitted, however, that the rule itself is required by the law of nature, and non-compliance with it is attended with illegitimacy and various other vices.

The questions relating to Hindu marriage—may be dealt with under five heads, namely, (1) prohibited degrees for marriage, (2) inter-marriage between different castes, (3) liability and guardianship for marriage of maids, (4) betrothal and ceremonies effecting marriage, and (5) legal consequences of marriage.

PROHIBITED DEGREES.

Principles of prohibited relationship for marriage.—The principles on which marriage is prohibited are discussed in Bentham's Theory of Legislation. The joint family system, which is a cherished institution of the Hindus, and which is the normal condition of their society, accounts for the prohibition by the Hindu sages, of marriage between larger number of relations than by other systems of jurisprudence. There are strong physiological reasons in support of the rules of Hindu law on this subject; and the same social reasons that render it necessary to forbid the marriage between brothers and sisters, would justify the prohibition of marriage between relations that may be members of a joint Hindu family. Those relations that are called to live together in the greatest intimacy from their birth, as well as those, one of whom stands in *loco parentis* to the other, should not be allowed to entertain the idea of marrying each other, and an insurmountable barrier between their nuptial union should be raised in the form of legal prohibition, so that the belief in the chastity of young girls, that powerful attraction to marriage, may be maintained unshaken. The Hindu legislators, however, are so anxious to

secure the foundation of this belief, that they ordain it to be an imperative religious duty of the father and the like relations, to dispose of damsels in marriage before the signs of puberty make their appearance, so that there might not be the shadow of a doubt in that respect.

Sages and Vedic texts on prohibited degrees.—I have already told you that the different sages have laid down different rules on the subject of prohibited degrees for marriage (p. 70). Most of their texts are given at the commencement of this chapter. (See Texts Nos. 1-10). On a perusal of these you will perceive the divergence between them; Manu prohibits the largest number, while Paithínasi the smallest. There is another important respect in which Manu and Sumantu differ from the other sages, namely, that the former prohibit the same number of degrees on both the father's and the mother's sides, whereas the others forbid a larger number on the father's than on the mother's side: the former view appears to be agreeable to popular feelings and in accordance with the actual practice. Another point deserves special notice, namely, that the language of Manu's text clearly shows that the rule propounded by him is recommendatory in character; and the actual usages of marriage, prevalent, in various localities and among divers tribes, prove the rules propounded by all the sages to be of that character.

Of the two Vedic texts (Nos. 9 and 10) one says that damsels of the third and the fourth degrees are espoused, evidently on the mother's and the father's side respectively; while the other implies marriage of cognate first cousins.

Customs thereon actually observed.—It is worthy of special remark that Paithínasi's *alternative rule* prohibiting only *five* degrees on the father's side, and *three* on the mother's, is actually *observed* in practice by the Bráhmanas of Bengal; and that the *Vedic text* indicating marriage of the *father's sister's daughter* and of the *mother's brother's daughter*, and thereby implying the prohibition of only two degrees on both sides, is actually *followed* in practice by even the Bráhmanas of Madras, and by the Kshatriya holders of impartible estates in the Jungle Mahals of West Bengal, and also by the Kshatriyas of many other places. There is an well-known precedent of marriage of the *maternal uncle's daughter*, namely, the espousal by the Kshatriya prince Arjuna—the hero of the battle of Kurukshetra, that internecine war which extirpated the warrior class of India,—of Subhadrá the beautiful daughter of Vasudeva and sister of Śríkrishna the incarnate Deity.

Table of prohibited degrees by different authorities.—The following table shows very clearly the diversity in the numbers of degrees of cognate damsels prohibited by different authorities:—

Authorities.	*Prohibited on father's side.*	*Prohibited on mother's side.*
Manu	7	7
Sumantu	7	7
Do. says, according to others	5	5
Vishnu	7	5
Yájnavalkya ...	7	5
Vasishtha ...	6	4
Paithínasi ...	7	5
	5	3
Yajurveda ...	3	2
Vedic text ...	2	2

Mita'kshara' on prohibited connection for marriage.—I have already given you the substance of the comments made by the Mitákshará upon the texts of Yájnavalkya on this subject (pp. 68-73), while discussing the definition of the term *Bandhu*.

The texts of Yájnavalkya are cited at pages 51 and 81 *supra* and with a view to enable the students to correctly understand the subject of Sapinda relationship for the purposes of marriage as well as of inheritance, the original passages of the Mitákshará bearing on the subject, with their translation, have been given at pp. 52-56 *supra*.

I think it necessary to give some details in the present connection. The Mitákshará says that the qualification that the bride should be non-*sapinda* applies to all castes, for the *sapinda* relationship exists everywhere : but the qualification that she shall not belong to the same *gotra* and *pravara* applies only to the three (regenerate tribes ; although the Kshatriyas and the Vaisyas have no *gotras* of their own, and therefore no *pravaras*, yet as they have *gotras* and *pravaras* derived originally from their ancient Gurus, the rule is applied to them also ; in support of this a text of A'svaláyana is cited : and then the Mitákshará goes on to say that the status of wife does not arise (among regenerate tribes) should the bride be a *sapinda* or *samána-gotra* or *samána-pravara* ; but the status of wife does arise although she may be diseased or the like ; for (the text No. 3 is merely recommendatory and not mandatory as regards the other qualifications of the damsel to be chosen for marriage, since) there would be only inconsistency with perceptible (and not with any spiritual) reasons (in case there be marriage of damsels having the other disqualifications

mentioned in Yájnavalkya's text, such as disease). Then the Mitákshará observes that as the qualification that the bride shall be non-*sapinda*, *i. e.*, non-relation, is too wide, according to the meaning of the word *sapinda* already explained, namely, a relation connected through the same body, therefore Yájnavalkya has added,—"*beyond the fifth and the seventh from the mother and the father respectively.*" And then goes on to explain this text in the passage which has been cited at pages 53-54 *supra*.

From the comments of the Mitákshará in that passage it appears to follow that "*the fifth and the seventh*" are to be counted from the mother and the father respectively, and that the seven ancestors on the father's side and the five on the mother's, may be traced through males or females, or both; for, although the Sanskrit word for degree is *purusha* which also means a male, yet it cannot on that account be contended that the lines must pass through the males only, inasmuch as in computing the five degrees on the mother's side, the mother is taken as one degree or *purusha*; and I have already told you that according to the latest commentators the downward lines from each of the ancestors may pass through males or females indifferently. Hence the maternal relations of the paternal as well as of the maternal grandfather, and of the paternal great-grandfather appear to be prohibited by the above rule of *sapinda* relationship for marriage; if the rule prohibiting five degrees from the mother of the *propositus* be extended to the maternal relations of the father and other paternal ancestors, instead of applying the rule of seven degrees on the father's side to the maternal relations of the paternal ancestors.

Let us now see what the later commentators say on the subject.

Later commentators on prohibited degrees.—The rules regarding prohibited degrees, extracted from the foregoing texts of the sages, by Raghunandana in his Udváhatattva, a treatise said to be respected in Bengal, are to be found in Dr. Banerji's valuable Tagore Lectures on the subject (pages 60-67). The same rules are reiterated by Kamalákara Bhatta, the author of the Nirnaya-sindhu which is regarded as an authority in the Benares School.

The rules contained in these works may be summarised as follows:

I. A man cannot marry a girl of the same *gotra* or *pravara*. This rule is called exogamy. This rule does not apply to the

Súdras who are said to have no *gotras* of their own; but it applies to the Kshatriyas and the Vaisyas, although it is alleged that neither have they any *gotra* of their own. The *gotras* of these three inferior castes are said to be those of the Gurus or preceptors, or the priests of their ancestors.

II. A man cannot marry a girl who is a cognate relation of any of the following descriptions:

(*a*) If she is within the seventh degree in descent from the father or from any of his six male ancestors in the male line, namely, the paternal grandfather and so forth.

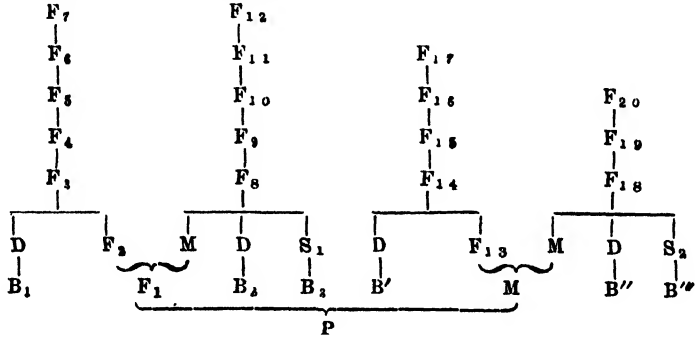
(*b*) If she is within the fifth degree in descent from the maternal grandfather or from any of his four paternal ancestors in the male line, the five degrees from the mother being counted by them exclusive of the mother.

(*c*) If she is within the seventh degree in descent from the father's *bandhus* or from any of their six ancestors through whom the girl is related.

(*d*) If she is within the fifth degree in descent from the mother's *bandhus* or from any of their four ancestors, through whom the girl is related.

III. A man cannot marry certain damsels though there is no consanguine relationship between them. They are the step-mother's sister, her brother's daughter, and his daughter's daughter; the paternal uncle's wife's sister, and the wife's sister's daughter, and the preceptor's daughter. This rule appears to be of moral obligation only, since it is not respected. Accordingly, it has been held that a marriage between a Hindu and the daughter of his wife's sister is valid: *Ragav* v. *Jaya*, I. L. R., 20 M., 283.

The second rule is somewhat complicated. The following diagram will enable you to understand without difficulty, those that are prohibited by this rule, especially by clauses (*c*) and (*d*).



P is the bridegroom. F_1 to F_7 are his seven paternal ancestors in the male line; F_8 to F_{12} are his father's five maternal ancestors in the male line; F_{13} to F_{17} are his mother's five paternal ancestors in the male line; F_{18} to F_{20} are his mother's three maternal ancestors in the male line; B_1, B_2 and B_3 are his father's *bandhus*; and B′, B″ and B‴ are his mother's *bandhus*.

The damsels that are prohibited to a man by the second rule are those that are within the seventh degree in descent from F_1 to F_{12}, from B_1, B_2 and B_3 and from S_1; and that are within the fifth degree in descent from F_{13} to F_{20}, from B′, B″ and B‴, and from S_2.

To this rule there is an exception, namely, that a girl, though within the seventh or the fifth degree as above described, may be taken in marriage if she is removed by three *gotras*, or in other words, by two intervening *gotras*, so that there must be four different *gotras* in the line of relationship including those of the bridegroom and the bride; but according to some, five such *gotras* are necessary. This shows that the lines of descent from the ancestors may pass through females only, who are transferred by marriage to different *gotras*.

Observations on the above rules.—Upon a careful study and consideration of the above rules, the texts from which they are deduced, and the reasons by which they are supported, the following observations suggest themselves :—

1. The Bráhmanical commentators say, as I have already told you, that the Kshatriyas, the Vaisyas and the Súdras have no *gotras* of their own, and that the *gotras* they have, are those of the preceptors or priests of their ancestors; yet they maintain that the Kshatriyas and the Vaisyas cannot marry within their *gotras*, but the Súdras can; although the reason assigned in support of this distinction, does not appear to be a cogent one.

2. In construing the texts (Nos. 1–7) prohibiting certain number of degrees on the mother's and the father's side, the later commentators restrict the counting of the upward degrees to the male line of the paternal male ancestors only, of both the mother and the father, as in the first and the third line in the above diagram; although in counting the descendants of each of those ancestors, they admit that the lines of descent may pass through both males and females indifferently, but no reason is assigned for drawing this distinction. They then deduce the prohibition of the relations indicated by the second

and the fourth line of ancestors in the above diagram, by putting a forced construction on the text (No. 5) of Nárada, which ordains that a girl within the seventh and the fifth from among the *bandhus* or relations on the father's and the mother's sides respectively, is not fit for marriage,—by taking the word *bandhu* in that text in the limited sense of the nine *cognates* enumerated in a particular text (Mit. 2, 6, 1), although there cannot be the slightest doubt that Nárada intended by that text to mean and include all the prohibited degrees both agnates and cognates, and that he employed the term *bandhu* in the sense of *sapinda*.

The truth seems to be that the later commentators found practical difficulty in avoiding all the damsels, coming within the rule, by counting the upward degrees through both male and female ancestors without distinction; so they thought it desirable that the descendants of the four lines of ancestors given in the above diagram should only be prohibited, and accordingly they put their own peculiar construction upon the texts for supporting their foregone conclusion.

3. That the later commentators count the number of degrees from the mother and the father respectively, by excluding the *propositus* and also the mother as shown in the 1st, the 2nd and the 3rd line of the diagram, while the Mitákshará counts from the parents by excluding the *propositus*, but it includes the mother as one degree.

4. That the seventh and the fifth descendants of the father's and the mother's *bandhus* respectively are prohibited; and they are the ninth and the seventh respectively, from the nearest common ancestor of the *propositus*: but there is no reason for this special rule.

5. That the sixth and the seventh descendants of F_8 to F_{12} who are P's father's maternal ancestors, are prohibited to P, but not to his father through whom they are related to P; or in other words, those relations of the father are not *sapindas* to him for the purpose of marriage, as they are on his mother's side and beyond the fifth degree; and yet they are *sapindas* to his son,—a monstrous proposition sought to be explained by what is called "the analogy of the frog's leap" which is beyond the comprehension of human beings save the narrow-minded and speculative Sanskrit writers of the dark age of Mahomedan India.

6. That there is no reciprocity; for, P cannot espouse many damsels, whose brothers, however, may, according to the

above rule, marry P's sister, and *vice versa*. This appears to be opposed to the popular notion according to which, A may marry B's sister, if B may marry A's sister. There is no reason why a larger number of degrees should be prohibited on the father's than on the mother's side, so far as relationship is concerned : for, the human body, says the Garbha-Upanishad, consists of six parts, of which three, namely, bone, sinew and marrow are derived from the father, and three, namely, skin, flesh and blood, from the mother.

7. That marriages do, often, take place in contravention of these rules even among those who would follow the same, by reason of the ignorance of distant relationship, owing to the difficulty in tracing out the relationship at the present time when people induced by the sense of security to life and property, enjoyed under the British rule, set up permanent dwelling houses in places distant from their ancestral homes, where they reside for the practice of any profession or calling, or for service.

These rules not all followed in practice.—I have already told you that these rules are not followed in practice. Different usages prevail among different tribes and in different localities. There is so much divergence between the sages as well as between the commentators on this subject, that it would not be safe to enforce their views as binding rules of conduct. The rule prohibiting marriage within the same *gotra*, which appears to be followed by the Bráhmanas in all places, is, however, too extensive, but it was laid down at a time when there appears to have been a local union of the families having the same *gotra* and *pravara*. When this rule does not apply to Súdras, there is no reason why it should apply to the Kshatriyas and the Vaisyas, as these three tribes stand on the same footing in this respect, if what the commentators say be correct. The Bengal Káyasthas, however, follow this rule in practice, and do not marry within their *gotra*, although they are supposed to be Súdras, by reason of their observance of some usages prescribed for the latter. It would seem reasonable that the legal rule of prohibited degrees for marriage cannot be different for different castes : hence, it would follow that what is valid marriage among the Súdras is also valid even among the Bráhmanas, notwithstanding special rules to the contrary, which should be treated as Laws of Honour, the violation of which will not invalidate the marriage, but will simply lower the position of the transgressor : (see text No. 5). It is useless to discuss this point at length, as the rules are not followed in practice, by all.

Customs contrary to Smritis.—Even the custom of marriage within the *Gotra*, is found to prevail among certain sections of the Bráhmanas : see sub-judge's judgment in *Devi* v. *Rani Radha* 31 I. A., 160. It has already been said that in Madras there is a custom prevailing even among the Bráhmanas, of marriage of a man with his maternal uncle's or paternal aunt's daughter. There is a text of the Sruti (text No. 9) in support of this custom, and the instance of Arjuna's marriage with Subhadrá, his maternal uncle's daughter, forms an well-known precedent. This custom appears to be observed by Kshatriyas in many places. It prevails among the families owning impartible Rajes in the Jungle Mahals of West Bengal, that claim to be Kshatriyas. The reason for this laxity has already been stated, (p. 71). It should be noticed that for the purpose of marriage there is no *sapinda* relationship between cognates, where or among whom this custom prevails.

The practical rule of prohibited degrees—for our courts to follow, is, as I have already told you (p. 71 *supra*), to pronounce a marriage to be valid, which has been celebrated in the presence, and with the presumed assent, of the relatives and the caste-people.

INTERMARRIAGE BETWEEN DIFFERENT CASTES.

The caste system—is the peculiar social organisation of the Hindus. There being no rational principle upon which the hereditary caste system, irrespective of qualifications, could be based, it is generally represented by comparatively modern writers of the Bráhmanical class who are most interested in maintaining it, to be a divine institution existing from the beginning of creation. But the sacred books contain no uniform or consistent account of its origin : the various accounts of it given by the different works of ancient Sanskrit literature, you will find, collected together with considerable research by Dr. Muir in the first volume of his Sanskrit Texts.

In some of the Puránas, castes are described as coeval with creation ; while there are others which say that originally there was but one caste which became multiplied in the Tretá or third age of the world owing to deterioration of men. The Mahábhárata categorically asserts that at first there was no distinction of classes, but that these have subsequently arisen out of differences of character and occupation ; and that the

title of a person to recognition as Bráhmana depends not on heredity, but on possession of superior merits :—

युधिष्ठिरः । सत्यं दानं क्षमा शीलम् आनृशंस्यं तपो घृणा ।
दृश्यन्ते यत्र नागेन्द्र स ब्राह्मण इति स्मृतः ॥

सर्पः । शूद्रेष्वपि च सत्यं च दानम् अक्रोध एव च ।
आनृशंस्यम् अहिंसा च घृणा चैव युधिष्ठिर ॥

युधिष्ठिरः । शूद्रे तु यद् भवेत् लक्ष्म द्विजे तच्च न विद्यते ।
न व शूद्रो भवेत् शूद्रो ब्राह्मणो न च ब्राह्मणः ॥
यत्रैतल् लक्ष्यते सर्प वृत्तं स ब्राह्मणः स्मृतः ।
यत्रैतन् न भवेत् सर्प तं शूद्रम् इति निर्दिशेत् ॥

आरण्यकपर्वणि आजगरपर्वणि १८० मे अध्याये ।

"Yudhisthira said, he is ordained to be Bráhmana in whom are found truthfulness, charity, forgiveness, uprightness, harmlessness, austerity and compassion.

"The serpent said, but O Yudhisthira, even in Súdras (are found) truthfulness, charity, absence of wrath, harmlessness, tenderness to living beings and compassion.

"Yudhisthira replied, If in a Súdra (by birth) the characteristic (of Bráhmanas) exists, and in a twice-born (by birth) the same does not exist, then the Súdra (by birth) should not be (regarded) a Súdra, nor the Bráhmana (by birth) a Bráhmana: he is ordained O Serpent! a Bráhmana in whom is observed the characteristic, and he in whom the same does not exist must be called a Súdra, &c."—A'jagara-parva, ch. 180.

In the Bhágavat-Gítá a chapter of the same work, the Blessed Lord said,—

चातुर्वर्ण्यं मया सृष्टं गुणकर्मविभागशः । ४, १३ ।

"I created four classes by the different distribution of qualities and actions."—4, 13.

ब्राह्मणक्षत्रियविशां शूद्राणाञ्च परन्तप ।
कर्माणि प्रविभक्तानि स्वभावप्रभवैर्गुणैः ॥
शमो दमस्तपः शौचं क्षान्तिरार्जवमेव च ।
ज्ञानं विज्ञानम् आस्तिक्यं ब्रह्मकर्म स्वभावजं ॥

शौर्यं तेजो धृतिर्दाक्ष्यं युद्धे चाप्यपलायनं ।
दानम् ईश्वरभावश्च क्षात्रं कर्म स्वभावजं ॥
कृषिगोरक्षवाणिज्यं वैश्य कर्म स्वभावजं ।
परिचर्यात्मकं कर्म शूद्रस्यापि स्वभावजं ॥ १८, ४१-४४ ।

"Of Bráhmanas, Kshatriyas and Vaisyas, and also of Súdras, O Enemy-vanquisher, the actions are different by reason of qualities sprung from the state of Self (or soul): (41). Equanimity, control of senses, austerity, purity, forgiveness, and straightforwardness, knowledge, realisation of knowledge, and belief in next world, are the Bráhmana's action sprung from the state of Self: (42). Bravery, spirit incapable of bearing insult or censure with impunity, fortitude, dexterity, and also not flying from battle, generosity, and commanding disposition, are the Kshatriya's action sprung from the state of Self: (43). Agriculture, cattle-tending and trade are the Vaisya's action sprung from the state of Self: and the Súdra's action, sprung from the state of Self, has the character of service: (44). Gítá—xviii, 41-44.

This revelation by the Blessed Lord ordains that it is not by birth, but by qualities and conduct due to his psychic state determined by the *Adrishta*, that the caste of an individual is determined.

The Bhágavata-Puráṇa called also Srímat-Bhágavata assigns different natural dispositions and qualities to the four castes, and assumes them to be hereditary, as a general rule, but concludes by asserting the possession of the dispositions and the qualities to be the sole test of the caste of individuals, thus,—

यस्य यल्लक्षणं प्रोक्तं पुंसो वर्णाभिव्यञ्जकं ।
यदन्यत्रापि दृश्येत तत् तेनैव विनिर्दिशेत् ॥ ७, १२ ३५ ।

which means,—"Whatever (dispositions and qualities) have been described as the distinctive mark indicative of the caste of a man, if the same are found also in another (*i. e.*, in a person of a different caste by birth), then he shall be designated by that very caste (which is indicated by the qualities, and not by the caste of his descent.)"

This view that qualification is the test of caste, is indicated

in several other passages of this work, one of which is as follows,—

स्त्री-शूद्र-द्विजबन्धूनां त्रयी न श्रुति-गोचरा । १, ४, २५ ।

which means,—"The three Vedas are not fit to be heard by females, Súdras, and *dvija-bandhus*," *i. e.*, male relations of the twice-born, or in other words those males that are descended from the twice-born, but are not themselves so by qualification.

There are also many passages in the Smritis, indicating the possession, by a man, of superior qualities to be necessary for his being a member of the Bráhmana caste in which he is born, and laying down that for certain conduct a Bráhmana shall be reduced to the position of Súdras. The converse case of a person of inferior caste being admitted to the superior rank by reason of endowment with good qualities, appears to be laid down in a few texts which, however, are interpreted by the commentators to be applicable to an exceptional case. See Manu, x, 64-65.

Heredity therefore, is the rule of caste, subject however to a theoretical exception based upon possession or absence of the characteristic qualities. But practically the caste system has become hereditary and has lost the principle upon which it seems to have originally been founded.

Twiceborn and Sudras.—The Smritis, which have thurst into prominence this system, divide men into two large classes, namely, the *Súdras* and the *Twice-born*. The study of the sacred literature forms the principle of this distinction. They ordain that by birth all men are alike to Súdras, and the *second birth* depends on the study of the sacred literature. Thus Sankha one of the compilers of the Dharma-Sástras declares,—

विप्राः शूद्रसमास्तावद् विज्ञेयास्तु विचक्षणैः ।
यावद् वेदे न जायन्ते द्विजा ज्ञेयास्तु तत्परं ॥

which means,—"Bráhmanas (by birth) are, however, regarded by the wise to be equal to Súdras until they are born in the Veda (*i. e.*, learn the sacred literature), but after that (*i. e.*, this second birth) they are deemed twice-born."

Passages to the same effect are found in most of the codes, according to which the recognition of the title of the Twice-born to superiority over the Súdras, depends upon acquisition of the knowledge of the Vedas.

Caste not peacefully established.—The caste system does not

appear to have been peacefully established, in so far as regarded the division of the Twice-born into three castes, namely, Bráhmana, Kshatriya and Vaisya: the Bráhmanical pretension to superiority was resented by the Kshatriyas from the first, when the Bráhmanas appear to have been compelled to admit into their class Visvámitra and his clan who according to them, had been Kshatriyas before. The exaggerated story of Parasuráma the Bráhmanical hero extirpating the Kshatriya race thrice seven times, and the anecdote of Ráma the Kshatriya prince defeating that hero, proves the continuation of the antagonism between the two castes, which is deprecated by Manu (ix, 322) who advised them to cultivate friendly feeling towards each other, not perhaps until after the propagation of Buddhism by a Kshatriya prince, inculcating equality of men, and so striking at the root of the caste system. This compelled the Bráhmanas to reduce their pretensions by promulgating the Tántrikism which was a compromise between the Bráhmanism or caste, and the Buddhism. By their intellectual superiority and monopoly of the Sanskrit literature they have, however, succeeded, by fair means or foul, to maintain their ascendancy to some extent. What turn the system will take, is yet to be seen, now that the people have been emancipated by the benign British rule, from the religious, moral and intellectual thraldom under which they used to labour before.

The number of castes.—It is said that there were originally four castes, namely, Bráhmana, Kshatriya, Vaisya and Súdra; but subsequently the various mixed castes have come into existence by either intermarriage or illicit connection between them and their issue in all sorts of combination, so that we find a distinct caste for each occupation which is said to be its own. This rather leads to the conclusion that most of these mixed castes must have been in existence when the system was introduced, if the occupations be taken to be the guide.

It should, however, be observed that having regard to the differences of character and occupation, the members of every political society are divisible into four classes corresponding to the four castes of the Hindus. Those distinguished by intellectuality, learning and religion are the real leaders of society. Next in importance are persons forming the royal class or the warriors on whom the safety and the very existence of the state depends, and who are characterized by physical agility, courage, administrative capacity and intelligence. Then

come those concerned in the production of wealth by agriculture, trade, and so forth, requiring intelligence and a lower standard of morality. And lastly, the labourers serving the preceding classes or practising the mechanical or similar arts, distinguished by their capacity for physical labour, and spirit of dependence. The virtues and qualities requisite for distinction in these occupations, as well as their importance to society are taken into consideration for fixing the relative rank of the four classes; and the common story of their origin is nothing more than an allegory representing society, and its different classes of members, as one human body and its limbs respectively. The fact that there are as many castes as there are occupations proves the origin of the institution. The explanation of the mixed classes by supposing them to be the issue of inter-marriage appears to be a play of imagination: where the abstract qualities of any two of the four tribes, were thought requisite for filling a particular occupation, persons following that occupation were supposed to be descended from the offspring of an inter-marriage or illicit connection between a man of the one tribe and woman of the other. Thus the Ambasthas or the members of the physician caste of Bengal are imagined to be a mixed caste sprung from the issue of a Bráhmana father and Vaisya mother: a physician resembles a Bráhmana in his general culture and learning, and also a Vaisya inasmuch as he does in a manner trade with his learning, and so the class is fancied to be mixed of the said two tribes, the worse quality being supposed to be derived from the mother and the better from the father. The number of castes appears to have increased with the increase of occupations, in the course of progress; for, later writers enumerate many that are not mentioned in the earlier works, and they describe the origin of the new castes according to their fancy.

It should be here remarked that the Súdras are not now the lowest class, as is generally supposed; for, all the mixed castes that are deemed to be descended from the issue of a superior mother and an inferior father, are ranked beneath the Súdras. The latest Sanskrit writers on castes say that pure Súdras as well as Kshatriyas and Vaisyas have become extinct. The reason of this assertion seems to be that these Bráhmanical writers do not wish to have two other twice-born castes possessed of privileges like themselves; and as regards Súdras, many castes which they represent to be mixed ones, appear from their occupations to belong to the Súdra tribe; but the

policy pursued by these Bráhmanas for the purpose of maintaining their own superiority to all, appears to have been to multiply and subdivide castes, in such a manner that each of these, though inferior to the sacerdotal class, may deem itself superior to some others, so that the vanity of that caste might be satisfied to some extent. For, although the rank of the four pure tribes is in the order in which they have been enumerated, yet it is difficult to ascertain the exact position of many of the so-called mixed castes in the order regarding the relative rank of castes, having regard to the various combinations of tribes, which the Bráhmanical imagination gives in describing their origin: thus the sense of humiliation which may be felt by a caste at the idea of being inferior to the Bráhmana and the like castes, is compensated by the conceit created by the notion of that caste itself being superior to others.

Sages and Mitakshara and Dayabhaga on intermarriage.— The account of the origin of the mixed castes, as given by Manu and other sages, shows that there were many of them, that sprung from sexual connection between inferior men and superior women. But while dealing with marriage, the sages lay down that marriage between persons of the same caste is preferable, and they also recognise marriage between a woman of an inferior caste and a man of a superior caste to be valid; but they do not say anything about the marriage between an inferior man and superior woman. There are, on the contrary, passages in the Smritis, providing punishment for a man having sexual intercourse with a woman of a superior class. Thus they do, by implication, prohibit intermarriage between a man of an inferior tribe and a woman of a superior tribe.

The Mitákshará and the Dáyabhága, the two treatises of paramount authority in the two schools respectively, appear to take the same view: for, partition of heritage between sons of a man by his wives of the same and the inferior tribes, is dealt with by the former in chapter I, Section 8, and by the latter in Chapter IX. The Mitákshará also deals with intermarriage in the Á'chára Kánda while dealing with marriage.

It should be noticed, however, that these works take into consideration only the four original tribes and not the mixed castes, while they deal with intermarriage or partition.

It should, however, be observed that these prohibitions appear to be of moral obligation only; hence, although marriage of an inferior man with a superior woman may be

disapproved and condemned, still if such a marriage does in fact take place, the same must be regarded valid as between the parties to it, and the issue legitimate. They may be excommunicated, and excluded from inheritance of their relations (Dáyabhága, XI, 2, 9): but as between themselves the relationship of husband and wife, and of parent and child must be held legitimate and there must also be reciprocal heritable right among themselves,—there being no authority for pronouncing the marriage to be invalid, however reprehensible, the same may be represented to be.

Prohibition of intermarriage by latest commentators.—The latest commentators Raghunandana and Kamalákara, however, prohibit intermarriage between the different tribes, upon the authority of some passages in the minor Puránas, enumerating practices that should be avoided in the Kali age: (See p. 9). But in this respect they differ from the two leading Treatises and the Smritis, which recognize the lawfulness of marriage between a man of a superior tribe and a woman of an inferior tribe. And their view appears to be adopted by the Calcutta High Court which held that a marriage of a Dome Bráhmana with a girl of the Haree caste is invalid, if not sanctioned by local usage: *Melaram* v. *Thannooram*, 9 W.R., 552.

Different subdivisions of the same caste.—There is no text of Hindu law prohibiting an intermarriage of persons belonging to the different subdivisions of the same tribe or *varna*. A practice, however, has grown up, and intermarriage between the different subdivisions of the same tribe do not now take place, although there is no legal bar to the same. For instance, there is no *connubium* between the Bárendra, the Rádhía and the Vaidika subdivisions of the Bengal Bráhmanas, nor between the Bangaja, the Uttara-Rádhíya, the Bárendra and the Dakshina-Rádhíya Káyasthas of Bengal. It is extremely doubtful whether such practice or custom may be the foundation of a rule of law, such as will justify a Court of Justice in declaring an intermarriage in fact to be invalid, when it is not prohibited either by the sages or by the commentators. In the Madras case of *Inderun* v. *Ramaswamy* 13 M.I.A., 141= 12 W. R., P.C., 41, the Privy Council has upheld an intermarriage between two different subdivisions of the Súdra tribe. In the case of *Narain Dhara*, I.L.R., 1 C., 1, there is one passage in the judgment from which it may be inferred that a contrary view of the law was taken. In that case the question was, whether from the fact that a man of the Kaibarta class and a

woman of the Táuti class lived as husband and wife for a period of twenty years, a marriage in fact could be presumed to have taken place between them. And it was held that it could not, inasmuch as the foundation of such a presumption was wanting in that case; for, the parties being members of two different subdivisions of the Súdra tribe, between whom there is in practice no intermarriage, the court could not think it a fact likely to have happened. It was not intended to be laid down that an intermarriage in fact, between different subdivisions of the same tribe is legally invalid; nor did that question arise for decision on the facts of that case. It has, however, been clearly laid down in the case of *Upoma* v. *Bholaram*, I.L.R., 15 C., 708, that such intermarriage is valid.

It should be remarked, however, that what were taken in those cases to be different subdivisions of the Súdra tribe, are represented by the latest writers to be mixed castes.

I may mention to you that in the Eastern Districts such as Sylhet and Tippera, there is a custom of intermarriage between the Vaidyas and the Káyasthas, (*Ram* v. *Akhoy*, 7 W.N., 619). as well as between the Káyasthas and the Shahoos.

Liability and Guardianship for marriage.

Expenses of Marriage-Sanskara or sacrament, charge.—Marriage is the last of the *Sanskáras* or sacramental rites that are ordained to have the effect of purifying the body specially from inherited taint, if any. As regards the females, marriage is declared to be equivalent to Initiation by the investiture with the sacred thread, for which they are disqualified. The performance of this sacrament for both male and female children is an imperative duty imposed on the father, and the expenses for it form a charge on the family property, (Mit., 1, 7, 3 *et. seq.*; D.B., 3, 2, 38 *et seq.*) so that a debt contracted for the marriage of a member is deemed as one contracted for a family purpose, and therefore for the benefit of the family: Mit., 1, 1, 28-29; *Sundrabai* v. *Shivnarayan*, I.L.R., 32 B., 81.

While dealing with the subject of gift, the Mitákshará says that a person having male issue is not competent to alienate his *whole* property, and in support of this proposition, the following text of Smriti is cited,—

पुत्रान् उत्पाद्य संस्कृत्य वृत्तिश्चेषां प्रकल्पयेत् ।

which means,—"Having begotten sons (the father) shall per-

form the *Sanskáras* or sacraments (including marriage) and shall make provisions for their maintenance."

It should be observed that the father has to perform certain religious ceremonies connected with, and to bear the expenses of, the marriage of sons although the latter are represented in the Smritis to be free agents with respect to their marriage.

Guardianship.—Hindu law does not contemplate marriage of males in their infancy, and so there is no rule regarding guardianship in their marriage. According to Hindu law a man attains majority after the completion of the fifteenth year, and this rule is unaffected by the Majority Act, so far as marriage is concerned; so a young man of that age is *sui juris* and may be taken to act for himself as regards his marriage.

The Sástras, however, enjoin early marriage of girls, and rules are laid down relating to Guardianship in their marriage. See Texts Nos. 14-16, *supra*, pp. 83-84.

But according to the practice now prevalent among the Hindus, the marriage contract is made by parents for children, so that the bridegrooms also are mere passive agents exercising no volition, their assent to their marriage is only inferred from the absence of dissent.

On a consideration of the texts of Vishnu, Yájnavalkya and Nárada cited above, Raghunandana places the maternal grandfather and the maternal uncle before the mother. But the author of the Mitákshará has adopted the rule laid down in the above text of Yájnavalkya (p.83), without any such addition, probably because cognates are not much thought of in that School. It is worthy of notice that the mother, who is the nearest natural guardian, holds the last place in the above order, although she may, after the death of her husband, give away her son in adoption which affects the interests of the boy given, to the same extent as marriage does those of a girl. There are some reported cases showing that a difference does often arise between the mother and the paternal relations of a girl with respect to her marriage. The latter would prefer a bridegroom who though not wealthy, is member of a family deemed highly honourable according to the artificial rules of *kulinism*, such alliance being conducive to the promotion of the social status of their own family; whilst the mother would prefer a wealthy and otherwise most eligible bridegroom though belonging to a family of inferior social position according to *kulinism*. (Text No. 19 *supra* p. 84).

In a case of dispute *before* marriage between the paternal

and the maternal relations for guardianship to dispose of a girl in marriage, the Court as representing the Sovereign and as such being the Supreme Guardian, may impose terms upon the relation having the right, for the benefit of the girl, who should not, however, be forced into a marriage odious to her: *Shridhar* v. *Hiralal*, I.L.R., 12 B., 480.

Duty not right.—The above texts, however, appear rather to impose a moral duty on the relations in the order they have been enumerated, enjoining them to provide a suitable match for a girl before her puberty, than to lay down such a strict rule of priority between them as might invalidate a marriage that has actually taken place but not under the superintendence of a relation who, under the circumstances, is the guardian indicated by the above rule. This appears to follow from what both Raghunandana and Kamalákara say, namely, that if the betrothal of a girl is made by her father who is of unsound mind, and thereupon a marriage is celebrated with the usual ceremonies, then the fact of the father's insanity cannot render the marriage invalid.

This view of the law on this point, has, subject to certain salutary exceptions, been taken by Justices Norris and Ghose in the case of *Brindaban* v. *Chundra*, I.L.R., 12 C., 140, in which the paternal uncle of a girl impugned the validity of her marriage celebrated by her mother. Their Lordships lay down the law thus :—"There can be no doubt that the uncle of the girl had a right in preference to the mother, under the Hindu laws, to give the girl away in marriage, but the mother, the natural guardian, having given her away, and the marriage having not been procured by fraud or force, the doctrine of *factum valet* would apply, provided, of course, that the marriage was performed with all the necessary ceremonies"

Having regard to the fact that amongst the respectable Hindus it would be difficult to find a man willing to marry a girl who has already passed through the ceremonies of marriage with another man, no marriage should be set aside even in a suit by the girl's father, only upon the ground that it took place without his consent or against his will. For, the sacrament of the marriage rite has the effect of causing the status of wife, unless the same has been vitiated by fraud or force. This view has been adopted by all the High Courts, and the texts relating to guardianship have been pronounced to be directory and not mandatory : See *Venkata* v. *Ranga*, I.L.R., 14 M., 316 ; *Ghazi* v. *Sakru*, I. L. R., 19 A., 515 ; and *Mulchand* v.

Bhudhia, I. L. R., 22 B., 812. Accordingly, in a case where the mother of a girl married her in disobedience of the order of a Civil Court directing her to make over the girl to her paternal uncle for the purpose of getting her married, it was held by the Bombay High Court that the principle of *factum valet* applied : neither the disobedience of the Court's order, nor the disregard of the preferable claim of the male relations would invalidate the marriage : *Bai* v. *Moti*, I. L. R., 22 B., 509. But the case may be different when a second ceremony of marriage with another man has already taken place at the instance of the proper guardian, which is possible among low castes; and there is a dispute between the two husbands ; for, then the Court may take into consideration which of the two marriages is more beneficial to the girl.

Liability of the father and the family property.—Although the aforesaid texts enumerating certain relations having the right or duty in their order, of disposing of maids in marriage, may be held to be of moral obligation only, still there is abundant authority in the Smritis and the Commentaries, for the proposition that the father is legally liable to celebrate the marriage of his maiden daughters, and that the expenses of the marriage of a damsel, and her maintenance until marriage, form legal charges on the property of the family, of which she is a member by birth. See Mit., 1,7 ; Vir., 2, 1, 21 ; D.B., 3, 32 *et seq.* Even the daughters of those that are excluded from inheritance, are to be maintained and married at the cost of the family property. It is difficult to understand the principle underlying the view expressed by a Bráhman Judge of the Madras High Court, viz. that under the Hindu Law a father is not under legal obligation to get his daughter married : *Sundari* v. *Subramania*, I. L. R., 26 M., 505. But see I. L. R., 23 M., 512 & 26 M., 497, in which a brother taking by survivorship the undivided coparcenary interest of a *deceased* brother was held liable to pay the expenses of the latter's daughter's marriage.

Betrothal.—Marriages are preceded by contracts of betrothal made in more or less solemn form by the guardians of the parties to them. But these contracts of betrothal are not considered to be binding or irrevocable, so as to be capable of specific performance : *Gunput* v. *Rajun*, 24 W.R., 207=I. L. R., 1 C., 74. But damages may be claimed and awarded for the breach thereof : *Purshotam* v. *Purshotam*, I. L. R., 21 B., 23.

Ceremonies.

Marriage Sacrament.—Although marriage itself is dealt with

as the last of the sacramental rites in that part of the Hindu law which is called *A'chára* as distinguished from *Vyavahára* or Litigation, still the marital rights and duties form a subject of litigation; and as this sacrament is preceded by, and founded on, the consent express or implied of either the parties to it or their guardians, the validity of a marriage may be impeached in the Civil Court, upon the ground of the absence of such consent, and of the use of fraud or force in bringing it about; and it may be declared null and void: *Anjona* v. *Proladh*, 14 W. R., 403.

Ceremonies.—I need not enter, in detail, into the numerous ceremonies that are generally observed in marriages, as most of you are aware of them, having passed through the same. But the question that strikes a lawyer is, What ceremonies are essential for the completion of marriage? Let us see what is stated by the writers on the ritual of marriage, as well as the customs on the subject.

The necessary ceremonies according to the works on ritual are the formal gift and acceptance, accompanied by religious rites consisting of the recitation of Vedic texts and the performance of the nuptial Homa called Kusandiká including *saptapadí-gamana* or walking seven steps. It has been held that the Vriddhi-Sráddha is not an essential ceremony; and that if it be proved that the mother made a gift of the bride, and that the nuptial rites were recited by the priest, it ought to be presumed that the marriage was good in law and that all the necessary ceremonies were performed. (See *Brindabun* v. *Chundra*, I.L.R., 12 C., 140). In this case the performance of the ceremony of *saptapadí-gamana* or walking seven steps, was not proved. If the performance of some of the ceremonies usually observed on the occasion of marriage, be proved, a presumption should be drawn that the marriage has been duly completed: *Bai* v. *Moti*, I.L.R., 22 B., 509.

It should however be observed that the religious ceremonies including walking seven steps are not necessary in the marriage of non-virgins, whose marriage therefore, may be performed in a secular mode: Text No. 21, p. 85 *supra*. Accordingly, religious ceremonies do not appear to be performed or deemed necessary in the re-marriage of women who are either widows, or relinquished, deserted or released by their living husbands (*Jukni* v. *Queen Empress*, I.L.R., 19 C., 627; *Vira* v. *Rudra*, I.L.R., 8 M., 440), prevalent amongst the lower castes in all parts of India, under the name of *shunga* or *sagai* in Bengal, *karao* in

the North-West, and *pat* or *nátra* in Bombay. These marriages are instances of the Gándharva form, as they take place by consent of the bride who is presumably a grown up woman. But some customary secular ceremony is performed, such as exchange of garland of flowers or the putting by the man of a red mark of vermillion on the forehead of the bride, in the presence of assembled friends and relations, (*Bissuram* v. *Empress*, 3 C.L.R., 410): and some ceremony is necessary, otherwise it would be difficult to distinguish *Gándharva* marriage from concubinage: (I.L.R., 3 A., 738). The Gándharva marriage does not seem to be obsolete, as it was thought in this case. The Madras High Court has held that in order to constitute a valid marriage in the Gándharva form, nuptial rites are essential: *Brinda* v. *Radha*, I.L.R., 12 M., 72. But in practice, some secular ceremony only is observed in the marriages of widows in the Gándharva form, among lower classes.

The latest commentators unanimously maintain the necessity of the performance of religious rites for the completion of marriage in all cases including even the Gándharva, although the well-known instance of Sakuntalá's espousal by Dushmanta negatives that view. In order to arrive at a correct conclusion, we must take into consideration the marriages of virgins, non-virgins and widows, and the ceremonies that are common to them. Manu appears to lay down that the essential ceremony for creating the status or marital dominion of the husband is the gift of the damsel by the father or other person having authority in that behalf; (text No. 20, p. 84 *supra*); the religious ceremonies being performed for procuring good fortune to the brides. Grown up damsels who have passed the nubile age, as well as widows, are deemed *sui juris* in this respect, and therefore may become self-given, or give themselves in marriage to men willing to marry them. The secular gift and acceptance of the bride would be sufficient to create the relation of husband and wife between the acceptor and the woman. Even acceptance is not necessary for the completion of a gift, according to the author of the Dáyabhága, who maintains (D.B., 1, 21-24,) that the relinquishment by the donor causes the right of the donee whose non-acceptance would extinguish the right created by the donor's act. In this connection the madman's marriage recognised by Hindu law, should be taken into consideration. Under certain circumstances "Silence is evidence of consent," मौनं सम्मतिलक्षणं, and "What is not dissented from, becomes assented to," अप्रतिषिद्धम् अनुमतं भवति।

Marriage complete without consummation.—According to Hindu law marriage is a sacrament, and in a religious point of view it causes a permanent indissoluble union of the husband and wife, extending to the next world; and when it has been solemnized with the essential rites prescribed for matrimony the status of husband and wife arises, and the marriage is complete and binding, although it may not be followed by consummation at all: *Administrator* v. *Ananda*, I. L. R., 9 M., 466.

Legal Consequences.

Guardianship.—The effect of marriage is to place the wife under the control of the husband, who is entitled to the custody of her person when she is minor, even in preference to her father, (I.L.R., 17 C., 298). So, when the husband dies and the wife is a minor, her deceased husband's relations are entitled to be her guardian in preference to her paternal relations; (*Khudiram* v. *Bonwari*, I.L. R., 16 C., 584). But the husband's reversionary heir who is interested in determining her life, should not be appointed the guardian of her person.

Maintenance, residence, &c.—Although the conjugal relation is based upon a contract of either the parties to the marriage, or their guardians, the rights and the duties of the married couple do not arise from any implied contract, but are annexed by law to the connubial relation as its incidents. The wife is bound to reside with the husband wherever he may choose to live. The fact of the husband having another wife will not relieve her from that duty: nothing short of habitual cruelty or ill-treatment will justify her to leave her husband's house and reside elsewhere. (*Sitanath* v. *S. Haimabutty*, 24 W.R., 377.) The duty which the Hindu law imposes on a wife to reside with her husband, wherever he may choose to reside, is a legal and not merely moral duty. An ante-nuptial agreement on the part of the husband that he will never be at liberty to remove his wife from her paternal abode, would defeat that rule of Hindu law, and is invalid on that ground, as well as on the ground that it is opposed to public policy: *Tekait* v. *Basanta* I.L. R., 28 C., 751. Obedience and conjugal fidelity to the husband are duties at all times required of the wife, who is not absolved from marital obligation by apostacy: (I.L.R., 18 C., 264).

The husband is bound to maintain the wife, to provide a suitable place for her residence, and to live with her.

In the absence of any breach of conjugal duties, the wife is entitled to the right of maintenance against the husband personally so long as he is alive, and against his estate after his death. But if the wife resides in her father's house against the will of the husband and without sufficient cause, she cannot claim maintenance while living separate from her husband.

But when the husband habitually treats the wife with cruelty and such violence as to create serious apprehension for her personal safety, she is justified in leaving her husband's protection and is entitled to separate maintenance from him: (*Matangini* v. *Jogendra*, I.L.R., 19 C., 84).

Restitution of Conjugal rights.—If either party is guilty of a breach of the marital duties, the other party may institute a suit against the former for the restitution of conjugal rights: *Surjya* v. *Kali*, I.L.R., 28 C., 37.

There may be circumstances which though short of legal cruelty, may nevertheless bar a suit for restitution of conjugal rights: *Dular* v. *Dwarka*, 9 W. N., 510=1 L. J., 283= I.L.R., 34 C., 971.

Unity of husband and wife.—According to Hindu law as well as to many other systems of law, the husband and wife become one person by marriage. Many legal consequences are annexed to this theory of unity of person. Amongst the Hindus this unity is now confined to religious purposes, and does not generally extend to civil matters. The wife can hold separate property, she may enter into a contract with any person and even with her husband, and may sue and be sued in her own name. But the theory that the wife is half the body of her husband, has an important bearing on several points of Hindu law.

According to the Penal Code the husband or the wife does not become guilty of the offence of harbouring an offender by screening each other.

Remarriage of women.—The Hindu sages provide single husbandedness as the most approved mode of life for women; the females that seek religious merit, must not, according to them, ever think of a second husband. But while the Hindu lawgivers thrust into prominence the said high ideal of conjugal duty for women influenced by religious and spiritual aspirations, they do, at the same time, recognize, under certain circumstances, remarriage of women that are impelled by inclination.

Even when her first husband is alive, a woman is allowed to remarry, should she be abandoned by her first husband for

adultery or any other cause, or he be not heard of for a certain period, or adopt a religious order, or be impotent or become outcasted. Thus Nárada (xii, 97) and Parásara (iv, 27) say;—

नष्टे मृते प्रव्रजिते क्लीवे च पतिते पतौ ।
पञ्चस्वापत्सु नारीणां पतिरन्यो विधीयते ॥

which means,—"Another husband is ordained for women in five calamities, namely, if the husband be unheard of, or be dead, or adopt a religious order, or be impotent, or become outcasted." The usage of remarriage of women during the lifetime of their first husband is found to be observed by some low castes, amongst whom the first marriage is dissolved either by a decision of the caste *Puncháyet*, or by the husband's *chhár chithi* or letter of release granted to the wife, who may then contract *sagai* or *niká* marriage with another man: *Jukni* v. *Empress*, I. L. R., 19 C., 627.

Widows.—The Smritis appear to provide three alternative conditions for widows, namely: (1) *sutteeism* or concremation with the deceased husband's body; (2) life of asceticism; or (3) remarriage. The first has been abolished by British legislation. The ascetic life is the alternative adopted by the females of respectable castes, so that amongst them remarriage of women came to be regarded as illegal, although it has all along prevailed among the lowest castes. It did accordingly become necessary to pass the Act XV of 1856 for legalizing the remarriage of Hindu widows belonging to the higher castes, among whom it had become, and still is, obsolete. This statute should properly be called after the name of the late Pundit Iswara Chandra Vidyáságara to whom it owed its origin and who framed its provisions.

Justification of rule against widow marriage.—The Hindu sages recommend that the widows should live a life of austerities, and they disapprove of remarriage of women. This recommendation has been adopted as a rule of conduct by the women of the higher castes, and the rule is justified on the following grounds: (1) Women as constituted by nature, can control and repress the sexual propensity, but men cannot; (2) the number of women is larger than men; (3) there are, no doubt, young widows in Hindu society, but there are not old maids, such as there are in European society; (4) the Hindu system is characterized by justice and equity to women, *all* of whom are *once* married, and they must blame their ill-luck but

not society should they lose their husband; for, they cannot justly claim to have another husband, as in that case so many maidens would be compelled to remain unprovided with husbands; (5) the boasted liberty of widows in European society in this respect, is accompanied by grave injustice to other females who are on that account compelled to live as lifelong spinsters, whose compulsory single condition moves not the vain philanthropists weeping for Hindu widows; (6) remarriage of women undermines the foundation of female chastity, which is the *sine qua non* of the bond, peace and happiness of home; (7) the utility of the institution should be tested by the good secured to the whole society, for the well-being and welfare of which, individual interests are often sacrificed.

Polygamy.—The Hindu law permits a man to have more wives than one at the same time, although it recommends monogamy as the best form of conjugal life. This recommendation has practically been adopted by the Hindus, and monogamy is the general rule, though there are solitary instances of polygamy. This usage, however, cannot but be held just, if the number of women is really larger than that of men. There are various reasons for and against polygamy which is sought to be interdicted by legislation deemed by some as the *panacea* for all evils in India. The Hindu institutions are founded on the requirements of the diversified human nature and condition, and ought not to be lightly interfered with, at the instance of persons distinguished by egotistic sentimentalism and spirit of intolerance. It is far better that those men of property, that are impelled by inclination, should take the responsibility of openly having several wives than that they should secretly contract as many left-handed marriages as they please. The modern legal distinction between public and private character lends only an external whitewash to the social structure of modern times. As to feelings of women, evidence is not wanting that there are females enjoying the liberty conferred on them by Western civilization, who would rather have a half or a quarter of a husband than none at all.

CHAPTER IV.

ADOPTION.

ORIGINAL TEXTS.

१। जायमानो ह वै ब्राह्मणम्-त्रिभिर्ऋणैः-ऋणवान् जायते। ब्रह्मचर्य्येण ऋषिभ्यो, यज्ञेन देवेभ्यः, प्रजया पितृभ्यः। एष वा अनृणो यः पुत्री, यज्वा, ब्रह्मचारी च॥ श्रुतिः।

1. A Bráhmana on being born becomes a debtor in three obligations; to the Rishis (who are propounders of the sacred books) for Studentship (to peruse the same); to the Gods, for Sacrifices; to the Paternal Ancestors, for Progeny: he is free from the debts, who has son, who has performed sacrifices, and who has studied the Vedas.—Revelation.

२। शुक्रशोणितसम्भवः पुत्रो मातापितृनिमित्तकः, तस्य प्रदानविक्रयत्यागेषु मातापितरौ प्रभवतः। न त्वेवैकं पुत्रं दद्यात् प्रतिगृह्णीयात् वा, स हि सन्तानाय पूर्व्वेषां। न स्त्री पुत्रं दद्यात् परिगृह्णीयात् वा अन्यत्रानुज्ञानात् भर्त्तुः। पुत्रं परिग्रहीष्यन् बन्धून् आहूय राजनि चावेद्य निवेशनस्य मध्ये व्याहृतिभिर्हुत्वा अदूरबान्धवं बन्धुसम्मिश्रम् एव प्रतिगृह्णीयात्, सन्देहे चोत्पन्ने दूरबान्धवं शूद्रम् इव स्थापयेत्, विज्ञायते हि एकेन बहवस्त्रायते इति॥ तस्मिंश्चेत् प्रतिगृहीते औरस उत्पद्येत चतुर्थभागभागी स्यात् दत्तकः॥ वसिष्ठः।

2. A son sprung from the virile seed and the uterine blood is an effect whereof the mother and the father are the cause; the mother and the father are, therefore, competent to give, sell or disown him; but an only son should neither be given nor accepted; for, he is intended for continuing the lineage of the ancestors; but a woman should neither give nor accept a son without the permission of the husband. One desirous of adopting a son should after having invited his relations, informed the king, and performed in the dwelling house the *Vyáhriti-Homa*, take one whose kinsmen are not unknown or one who is a near kinsman. But if a doubt arises (as to the caste), then the adopted son whose kinsmen are unknown, should be set apart like a Súdra; for it is well known that by one many are saved. If after he has been adopted an *aurasa* or real legitimate son be born, then the Dattaka shall be participator of a fourth share.—Vasishtha.

३। औरसो धर्म्मपत्नीजस्-तत्समः पुत्रिकासुतः।
क्षेत्रजः क्षेत्रजातस्तु सगोत्रेणेतरेण वा॥
गूढे प्रच्छन्न उत्पन्नो गूढजस्तु सुतः स्मृतः।
कानीनः कन्यकाजातो मातामह-सुतो मतः॥
अक्षतायां क्षतायां वा जातः पौनर्भवः सुतः।
दद्यान् माता पिता वा यं स पुत्रो दत्तको भवेत्॥
क्रीतस्तु ताभ्यां विक्रीतः कृत्रिमः स्यात् स्वयं-कृतः।
दत्तात्मा तु स्वयं दत्तो गर्भे विद्वः सहोढ़जः।
उत्सृष्टो गृह्यते यस्तु, सोऽपविद्धो भवेत् सुतः॥
पिण्डदोंऽशहरस्तेषां पूर्व्वाभावे परः परः॥

याज्ञवल्क्यः, २,१२८-१३२॥

3. The *aurasa* or real legitimate son is one begotten (by the man himself) on the lawfully wedded wife: equal to him is the appointed daughter's son:—the Kshetraja or appointed wife's son is one begotten on a wife by a kinsman or any other (appointed to raise issue): *Gúdhhaja or adulterous wife's son is a son secretly begotten on a wife: the Kánina or damsel's son is a son born of an unmarried daughter, and deemed the son of his maternal grandfather: the Paunarbhava or twice-married woman's son is one born of a twice-married woman, whether her first marriage was consummated or not: the Dattaka son is a son whom the mother or the father gives in adoption: the Krita or purchased son is one who is sold (for adoption) by the mother and the father: the Kritrima or son made is one who is adopted by the man himself: the Svayandatta or self-given son is one who gives himself: the Sahodhhaja or pregnant bride's son is one who is in the womb of his mother when she is married; and the Apaviddha or deserted son is one who is abandoned (by his parents) and adopted as a son. In default of the first among these the next in order is the giver of the *Pinda* and the taker of the share.—Yájnavalkya, 2,128-132.

४। माता पिता वा दद्यातां यम् अद्भिः पुत्रम् आपदि।
सदृशं प्रीतिसंयुक्तं स ज्ञेयो दत्रिमः सुतः॥
सदृशन्तु प्रकुर्य्यात् यं गुण-दोष-विचक्षणं।
पुत्रं पुत्रगुणैर्युक्तं स विज्ञेयश्च कृत्रिमः॥ मनुः, ९, १६८-१६९।

4. A son equal in caste and affectionately disposed whom his mother or father (or both) give with water at a time of calamity, is known as the Dattrima (=Dattaka) son. A son equal in caste, competent to discriminate

between merit and demerit, and endued with filial virtues, who is adopted (by the man himself), is known as the Kritrima son. Manu, ix, 168-169.

५। अपुत्रेणैव कर्त्तव्यः पुत्रप्रतिनिधिः सदा।
पिण्डोदकक्रियाहेतो-र्यस्मात् तस्मात् प्रयत्नतः॥
पिता पुत्रस्य जातस्य पश्येत् चेत् जीवतो मुखं।
ऋणम् अस्मिन् संनयति अमृतत्वञ्च गच्छति॥
जातमात्रेण पुत्रेण पितृणाम् अनृणी पिता।
तदङ्गि ऋणिम् आप्नोति नरकात् त्रायते हि सः॥
एष्टव्या बहवः पुत्रा यद्येकोऽपि गयां व्रजेत्।
यजेत वाश्वमेधेन नीलं वा वृषम् उत्सृजेत्॥ अत्रिः।

5. By a sonless person only, should always a substitute of a son be anxiously made, for the sake of funeral oblations, libations of water and obsequial rite. If the father sees the face of a living son after birth, he transfers the debts to him, and attains immortality. As soon as a son is born, the father becomes absolved from the debts to paternal ancestors; on that day he acquires purity, since the son saves from the infernal regions. Many sons are to be secured, if even one may go to Gayá, or celebrate the horse-sacrifice or dedicate a Níla bull.—Atri.

६। देशानान्तु विशेषेण भवेत् पुण्यम् अनन्तकं।
गयायाम् अक्षयं श्राद्धे प्रयागे मरणादिषु॥
गायन्ति गाथां ते सर्व्वे कौर्त्तयन्ति मनीषिणः।
एष्टव्या बहवः पुत्रा शीलवन्तो गुणान्विताः॥
तेषां तु समवेतानां यद्येकोऽपि गयां व्रजेत्।
गयां प्राप्यानुषङ्गेण यदि श्राद्धं समाचरेत्॥
तारिताः पितरस्तेन प्रयान्ति परमां गतिं॥ उशनाः।

6. But in particular places the religious merit is endless: it is inexhaustible in a Sráddha at Gayá, and in death and the like at Prayága (or concourse of the Ganges and the Jumna). All those sages sing and proclaim the following verse,—"Many sons should be secured, possessed of good character and endowed with virtue: if amongst them all, even one goes to Gayá, and if having arrived at Gayá perform the Sráddha, the paternal ancestors being saved by the same, attain the highest state."—Usanas.

७। कांक्षन्ति पितरः सर्व्वे नरकाद् भय-भीरवः।
गयां यास्यति यः पुत्रः स न स्त्राता भविष्यति।
एतस्मा-बहवः पुत्राः यद्येकोऽपि गयां व्रजेत्।
यजेत वाश्वमेधेन नीलं वा वृषम् उत्सृजेत्॥ बृहस्पतिः।

7. All the paternal ancestors apprehending fear of the infernal regions are desirous that that son who will go to Gayá will become our saviour. Many sons should be secured if even one may go to Gayá, or perform the horse-sacrifice, or dedicate the Níla bull.—Vrihaspati.

८ एतस्मा बहवः पुत्रा यद्यप्येको गयां व्रजेत्।
यजेत वाश्वमेधेन नीलं वा वृषम् उत्सृजेत्॥ लिखितः।

8. This is almost the same as the second verse of Vrihaspati.

९। अपुत्रेण सुतः कार्य्यो यादृक् तादृक् प्रयत्नतः।
पिण्डोदकक्रियाहेतोर्नामसंकीर्त्तनाय च॥
दत्तकमीमांसाधृतमनुवचनं।

9. By a sonless person, should any description of sons be anxiously made, for the sake of funeral oblations, libations of water, and obsequial rite, as well as for the celebrity of name.—Cited in the Dattaka-mímánsá as a text of Manu.

१०। ऋणम् अस्मिन् सन्नयति अमृतत्वञ्च गच्छति।
पिता पुत्रस्य जातस्य पश्येच्चेत् जीवतो मुखं।
अनन्ताः पुत्रिणां लोका नापुत्रस्य लोकोऽस्तीति श्रूयते॥ वशिष्ठः।

10. If the father sees the face of the living son on birth, he transfers the debt to the son, and attains immortality. It has been revealed that endless are the heavenly regions for those having male issue but there is no heavenly region for a sonless man.—Vasishtha.

११। गोत्ररिक्थे जनयितुर्न हरेद् दत्रिमः सुतः।
गोत्ररिक्थानुगः पिण्डो व्यपैति ददतः स्वधा॥ मनुः, ९। १४२।

11. The adopted son is not to take away (with him when he is passing from the family of his birth to that of adoption), the *Gotra* and the *Riktha* of the progenitor: the *Pinda* is follower of the *Gotra* and the *Riktha*, the Swadhá (or spiritual food) goes away absolutely from the giver.—Manu, ix, 142.

Gotra is generally rendered into family, but it means here, "the status of being the son:" *Riktha* means wealth, but it means here patrimony or family property, *i.e.*, property to which the right of the male issue arises by birth, or to which the right of the boy has already arisen.

Sir William Jones, however, translated the first line of this text thus,—"A given son must never *claim* the family and estate of his natural father," and this version has been accepted by the translators of Sanskrit works on law, in which this text is cited. But this version is mis leading, if not inaccurate, implying as it does *future* and not vested right.

१२ । पुत्रान् द्वादश यान् आह नृणां स्वायम्भुवो मनुः ।
तेषां षड् बन्धुदायादाः षड् अदायादबान्धवाः ॥
औरसः क्षेत्रजश्चैव दत्तः कृत्रिम एव च ।
गूढोत्पन्नोऽपविद्धश्च दायादा बान्धवाश्च षट् ॥
कानीनश्च सहोढश्च क्रीतः पौनर्भवस्तथा ।
स्वयन्दत्तश्च शौद्रश्च षड् अदायादबान्धवाः ॥ मनुः, ९ ।१५८-१६० ॥

12. Manu sprung from the Self-existent has declared twelve sons of men: of these six become *affiliated* or members of the *Gotra* and *Co-parceners* and six become *affiliated* or members of the *Gotra* but not *Co-parceners*. The *aurasa* or true legitimate son, the appointed wife's son, the Dattaka, the Kritrima or son made, the secretly begotten son of the wife, and the deserted son—these six become *coparceners* and *affiliated* or members of the *Gotra*: the maiden daughter's son, the pregnant bride's son, the purchased son, likewise the twice-married woman's son, the self-given son and the son by a Súdra wife,—these six become *affiliated* or members of the *Gotra* but not *coparceners*.—Manu, ix, 158-160.

ADOPTION.

Sons in ancient law.—The usage of adoption is the survival of an archaic institution based upon the principle of slavery, whereby a man might be the subject of dominion or proprietary right, and might be bought and sold, or given and accepted, or relinquished, like the lower animals. The above text of Vasishtha shows that children were absolutely under the power of the father who could give, sell or disown them. The *patria potestas* of the Roman law in its earlier stage furnishes us with a true conception of the father's unlimited power over children in primitive society. Marriage in ancient law, consisted in transfer of the father's dominion over the damsel to the husband. Lifelong subjection was the condition of women who were under the dominion of either the father or the husband or their relations. Male children, however, became *sui juris* on the death of the father and the like paternal ancestors.

A careful consideration of the descriptions of the twelve kinds of sons will give an idea of the primitive conception of

family relationship. The *aurasa* or a son begotten by a man on his own wife is what is now understood by the term son. But the Kshetraja or appointed wife's son was a son begotten on one man's wife by another man who was appointed by the husband or his kinsmen for that purpose. This resembles the usage of Levirate prevalent among the Jews (see the Bible, Book of Ruth, and Deuteronomy xxv, 5-8). The son so produced became the son of the woman's husband. So also was a son whom a wife secretly brought forth by adultery, this son called Gudhhaja became the son of the woman's husband. A son born of an unmarried daughter became the son of the maternal grandfather. The pervading principle appears to have been that a wife and a maiden daughter belonged respectively to the husband and the father, and a son born of them belonged to their owner, in the same way as a calf produced by a cow becomes the property of the owner of that cow. So was the *putrikâ-putra* or a son of an appointed daughter who was given in marriage to the bridegroom, with the condition that the son born of her would belong to her father, the marriage in such a case did not operate as a transfer of dominion over the damsel, from the father to the husband. Similarly the child in the womb of the pregnant bride was transferred by marriage to the bridegroom. The son of a twice-married woman is now deemed *aurasa* or real legitimate son, but he is enumerated among secondary sons, as remarriage of women was disapproved by the sages. A man became the father of these seven descriptions of child by the operation of ancient law. It should be observed here that although the Smritis purport to give the above classification of *sons*, it must necessarily include *daughters* as well.

Then come the five descriptions of sons by adoption, *viz.*, the Dattaka and the Kríta are sons given or sold respectively by their parents to a man who takes the boy for affiliating him as a son. The Kritrima and the Svayandatta are the sons made and self-given, they are destitute of parents and therefore *sui juris* and free to dispose of themselves, they become the sons of the adopter with their own consent, the difference between them being that in the case of the Kritrima or son made the offer comes from the adopter, while in the case of the self-given son the offer is made by him. An *apaviddha* or deserted son is one who is abandoned or disowned by his parents and is adopted by a person as his son; this is like the appropriation by the finder of a thing without an owner.

The above descriptions of the divers kinds of sons recog-

nized in ancient times, disclose that sexual relation was very loose, and chastity of women was not valued. The relation of husband and wife, of father and son, and of master and slave, appears to have involved the idea of absolute power on the one hand, and abject subjection on the other, or of the one being the property of the other. Procreation by the father was not a necessary element in the conception of sonship.

The hankering after sons, proved by the recognition of the different kinds of sons, appears to have owed its origin to the exigencies of primitive society composed of families governed by patriarchal chiefs. In the unsettled state of tribal Government in early times, the number of male members capable of bearing arms was of special importance; and the same cause that enhanced the value of sons operated to lower the position of women as well as of men labouring under bodily disability or infirmity such as blindness.

Doctrine of spiritual benefit.—The Hindu society appears to have been civilized by means of religious influence. India is the land of religion, where all conceivable systems of theological doctrines arose and are still prevalent, ranging from polytheism to monotheism and from Sánkhya atheism to Vedántic pantheism. It has no place in the political history of the world, but holds the most prominent position in its intellectual and religious history.

It is erroneous to suppose that the law of adoption owed its origin to the doctrine of spiritual benefit conferred by sons. You cannot associate the sacred name of religion with practices based upon immorality and looseness of sexual relation: there is no system of religion known, that countenances an institution partly founded on adultery, seduction and lust. The Hindu religion which is moulded on asceticism, is least likely to sanction the immoral usages relating to several descriptions of sons recognized by ancient society. As regards ancestor-worship upon which the erroneous view is founded, its ritual shows that that ceremony is performed not so much for the purpose of conferring any benefits on the ancestors, as for the purpose of receiving benefits from them.

On the contrary, the doctrine of spiritual benefit seems to have been invoked for the purpose of discouraging the institution of subsidiary sons. The Hindu sages who are the propounders of the Smritis or Codes of Hindu law, appear to have introduced the doctrine of spiritual benefit derived from male issue, with the view of suppressing the laxity of marri-

age union, the looseness of sexual morality, the institution of subsidiary sons, and the improper exercise of *patria potestas*. They endeavoured to impart a sacred character to marriage, to impress the importance of female chastity, to discourage the immoral usages of affiliation, and to ameliorate the condition of sons and wives over whom the *pater familias* had absolute dominion extending to the power of life and death.

If you carefully read the passages of the Smritis, extolling the importance of sons in a spiritual point of view, you will find that they all relate primarily to the real legitimate son, and not to the secondary sons. In fact the sages divide sons into primary and secondary, with a view to mark the superiority of the Aurasa or real legitimate son—the primary son. They also divide the sons into two or three groups to show their relative rank : the real legitimate son and the appointed daughter's son are declared to hold the highest position in a spiritual point of view ; to the sons by adoption is assigned a middle rank ; while the sons by operation of law, owing their origin to adultery, unchastity and looseness of sexual relation, are condemned and pronounced to be useless in a spiritual point of view.

Law of adoption simple.—The law of adoption, as propounded in the Smritis and explained in the Mitákshará, the Dáyabhága and similar commentaries respected by the different schools, is very simple. But many useless and arbitrary innovations were, for the first time, introduced by Nanda Pandita in his treatise on adoption, entitled the Dattaka-Mímánsá, composed some time after his Vaijayantí a Commentary on the Institutes of Vishnu, which was completed in Sambat 1679 = 1623 A. D., or a little over a century and a quarter before the establishment of British rule in India. There is no cogent reason why the position of a Legislator should be accorded to Nanda Pandita a mere Sanskritist without law, who had nothing whatever to do with the then government of the country, and the novel rules unfairly deduced by him from a few texts unnoticed by, if not unknown to, all the authoritative commentators most of whom appear to have compiled their works under the auspices of reigning Hindu kings—should be inflicted upon the Hindus as binding rules of conduct. The adventitious circumstance of the work being translated into English at an early period mainly contributed to the notion that it was an authoritative work on adoption, respected all over India ; and this erroneous view originating with the learned translator who assumed it to be an ancient work,

has been often repeated without question, though there is abundant evidence in the reports of cases and records of customs that its peculiar doctrines are not respected in most places. The character of the work has only recently been judicially considered by a Full Bench of the Allahabad High Court presided by Sir John Edge, the Chief Justice, who has in an elaborate and exhaustive judgment dealt with the matter and come to the conclusion that the innovations introduced by Nanda Pandita should not be followed as binding rules The majority of the Judges have concurred in that view, but the minority would follow the maxim *Communis error facit jus*, and hold that the Dattaka-Mímánsá is binding, because it has several times been erroneously asserted to be a work of paramount authority on questions of adoption, although there is neither reason nor rhyme why it should be so regarded. See *Bhagwan Singh* v. *Bhagwan Singh*, I.L.R., 17 A., 294. The Judicial Committee, however, have set aside the view of the majority, and upheld that of the minority, for reasons cited at page 47.

Evidence as to Dattaka-chandrika being a forgery.—I have already told you that there is a well-grounded tradition in Bengal, that the Dattaka-chandriká is a literary forgery by one Raghumani Vidyábhúshana in the false name of Kuvera. The same tradition is also stated in the Tagore Lectures on adoption. But with respect to it, a learned judge of the Allahabad High Court has made the disparaging remark, that "he is not prepared to place any value on," what he erroneously imagines to be, "the story which" the Tagore Professor "has stated" (I. L. R., 17 A., 313). Had the learned Judge glanced at the reference given at the bottom of page 124 of the Tagore Lectures, and procured the book therein referred to, he would have found that the tradition was stated in 1855 A. D., by the greatest Bengali of the nineteenth century. However, it has, therefore, become necessary to set forth the evidence supporting the conclusion that the Dattaka-chandriká is a literary forgery. The evidence consists of the following :—

(1) Sutherland the learned translator, believed that this treatise was not really composed by Kuvera by whom it purports to be written, though he was not informed of the real author.

(2) In 1855 A.D., Pandit Iswara Chandra Vidyáságara published his Disquisition on the Legality of the Re-marriage of Hindu Widows, in both the English and the Bengali languages, and succeeded in inducing the Legislature to pass the Act XV of 1856 for legalizing the re-marriage of Hind

widows. In a note appended to the Bengali version of that work he states to the effect,—that Raghumani Vidyábhúshana composed the Dattaka-chandriká under the false name of Kuvera, and did at the same time, make it known by the acrostic in the last sloka that he was the real author. (See sixth edition of the Disquisition, page 182).

(3) In 1858 A.D., Pandit Bharat Chandra Siromani published in the Bengali character the original Dattaka-Mímánsá and Dattaka-chandriká with his own Sanskrit commentary thereon. He had been a Hindu-law-officer attached to the District Court of Burdwan, and after the abolition of that post, became the Professor of Hindu law in the Government Sanskrit College of Calcutta. While commenting on the last sloka of the Dattaka-chandriká (see *ante* p. 32) he says as follows :—

श्रीरघुमणिविद्याभूषणकृतिरियम् इति प्रसिद्धिः अस्मिन् श्लोके तन्नामोल्लीखनप्रसिद्धिश्च । प्रथमचरणप्रथमाक्षर-द्वितीयशेषाक्षर-तृतीयप्रथम-चतुर्थशेषाक्षरैः रघुमणिरिति नामोद्धृतश्च । (see second edition of those works in Deva-nágari character, page 41 of the Dattaka-chandriká) which means,—"It is a widely known tradition that this is the work of Raghumani Vidyábhúshana, it is also a widely known tradition that his name is made known in this sloka; the name Raghumani is given out by the first syllable of the first foot, the last of the second foot, and the first of the third foot, and the last of the fourth foot."

The venerable Pandit, however, adds इदम् अस्माभं न रोचते which means literally,—"This to us is distasteful." The idea is undoubtedly most painful and humiliating that a learned man like Raghumani was guilty of a literary forgery committed for the purpose of perpetrating a fraud upon the court of justice. Assuming that the Pandit means to say that "it is not acceptable to me," yet that does not affect the tradition at all.

(4) The tradition is well known to all Bengali Pandits professing to be *Smártas* or Hindu lawyers. It is curious that the tradition which has all along been so well-known to the Smárta Pandits is unknown to the English-educated native lawyers without Sanskrit.

(5) In 1863 A.D., when I was a student of the Smriti class in the Sanskrit College, I heard it from Pandit Bharat Chandra Siromani who also told the names of the parties to the law suit for which the book was fabricated, and other details including the objects.

(6) The tradition is well-known to the descendants of the litigant parties, of whom the claimant by adoption was to be benefitted by the book. And I have heard it from that claimant's son's daughter's son who was a Vakil of the Calcutta High Court, but is now retired.

(7) The tradition is well-known to the descendants of the family to which Raghumani belonged, and I have heard it from his brother's great-grandson who also told that Raghumani was the Pandit of Colebrooke and was an inhabitant of Bahirgachi in the District of Nuddea.

(8) The case for which the book was fabricated is referred to in Sir Francis Macnaghten's Considerations on Hindu Law; he was the counsel for the adopted son, and as he says that from the law as it was understood at that day, he was certain that his client would have been entitled to *one-third* of the estate, had the cause been not settled by the parties themselves,—therefore it is clear that his attention was not drawn to the book, according to which his client would have been entitled to *one-half*, instead of *one-third*, of the estate. Had the book been in existence at the commencement of the litigation, the counsel for the adopted son the plaintiff, should undoubtedly have known it which is so favourable to his client. The book appears to have been forged subsequently, and it did not become necessary to invite the counsel's attention to it as the case was settled out of Court. The book appears to have been written in the year 1800 A.D.

(9) The book is said to be of special authority in Bengal and yet it was altogether unknown to Pandit Jagannath Tarkapanchánana, whose digest of Hindu law published in 1796 A.D., does nowhere refer to it.

This is not the only instance of literary forgery of the kind. Subsequently in 1832 A.D., some Pandits of the Calcutta Sanskrit College gave a Vyavastha supported by the authority of certain Manuscript books, in a case between Jainas. (See 5 Bengal Select Reports, page 326, new edition). Those books were really fabricated by the Pandits, but the Librarian of the College was bribed and the books were placed in the Library, and their names entered in the list of books contained therein. The plan was well designed, but unfortunately for them, Dr. H. H. Wilson the then Secretary of the Sanskrit College had in his possession another list of the Library books, and the fraud was detected. As the Pandits confessed their guilt to Dr. Wilson, the only punishment inflicted on them was, that they

were deprived of the source of income derived from giving Vyavasthás, by an imperative rule to the effect that the Pandits of the Sanskrit College shall not, on pain of dismissal, give any Vyavasthá intended to be used in a law-suit. The rule has ever since been in force and followed. Similar fabrications seem to have been made later on, but became unsuccessful: see *Dey* v. *Dey*, 2 Indian Jurist. N.S., 24.

But you must not jump to a general conclusion against the Pandits from these isolated instances. While we find some of these heterodox Pandits, who were considered degraded by reason of teaching the sacred literature to Europeans or by reason of accepting service under them, tempted to deviate from the path of rectitude, we also find many orthodox Pandits possessed of virtues of a superior order, who are on that account respected as gods by the Hindu community. But in these days of Mammon worship, their number is fast decreasing.

The object of adoption—is twofold, the one is spiritual and the other secular: a son is necessary for the attainment of a particular region of heaven, for the performance of exequial rites, and for offering periodically the funeral cakes and the libations of water; as well as for the celebrity of name, and for perpetuation of lineage. Most of the spiritual objects may be attained by a man destitute of male issue through the instrumentality of other relations, such as the brother's son. But the secular object may be gained only by means of a son real or subsidiary. A man again that aims at *moksha* or liberation from transmigration of the soul, does not require a son and cannot adopt one.

Dattaka and Kritrima.—The Dattaka and the Kritrima are the only forms of adoption which are now recognized by our Courts. Of these the Dattaka is said to be in force everywhere; and the Kritrima, confined to Mithilá only. The Kritrima form, however, appears to be prevalent in many districts in Northern India if not also in Deccan.

Putrika-putra.—It is most natural that a person destitute of male issue, should desire to give to a grandson by daughter the position of male issue. The appointed daughter's son is not regarded by Manu as a secondary son, but is deemed by him as a kind of real son. This form of adoption appears to prevail in the North-Western Provinces, and neighbouring districts. The Talukdars of Oudh submitted a petition to Government for recognising the appointed daughter's son; and accordingly in the Oudh Estates Act "son of a daughter treated in all respects as one's own son" is declared to be heir, in default of

male issue. This sort of affiliation appears to be most desirable and perfectly consistent with Hindu feelings and sentiments ; there is no reason why it should not be held valid, when actually made by a Hindu. The Dattaka-Mímánsá appears to have been written on purpose to invalidate the affiliation of a daughter's son, for the benefit of agnate relations.

Sahodha and Paunarbhava.—The pregnant bride's son and the twice-married woman's son are both recognised at the present day, but they are deemed as *aurasa* or real legitimate sons, and not as secondary or subsidiary sons. However it is thus clear that the opinion of the authors of the two treatises on adoption is not respected in this respect.

Division of subjects.—I. Dattaka, II. Kritrima and other forms.

The subject of the Dattaka adoption may be discussed under five heads : (1) who may adopt, (2) who may give away in adoption, (3) who may be given and taken in adoption, (4) what ceremonies are necessary, and (5) what is its effect on the status of the boy.

Dattaka : who may adopt.

Capacity of males.—A consideration of the definitions of twelve kinds of sons, will show that there could not be any restriction as to the number of subsidiary sons in early times, for a man could have a subsidiary son even against his will. There are passages of law, however, which recommended that a man who is destitute of son should make a substitute of son, which evidently discourages adoption by a man having an *aurasa* or real legitimate son. While commenting on these, Nanda Pandita concedes that a man may adopt a son with the consent of an existing *aurasa* son. This recommendation has now been converted into an imperative rule, and its operation has been extended by the Privy Council in the case of *Rungama* v. *Atchama*, 4 M.I.A., 1, holding that a man having an *adopted* son cannot adopt another. If the attention of their Lordships had been drawn to the injunction for securing many sons, laid down in Texts Nos. 5-8 and in passages to the same effect in other Codes, the decision would have been different. Bearing in mind that in Hindu law a son's son and a son's son's son hold the same position as a son, the result is that a man having a real legitimate or an adopted, son, grandson or great-grandson, cannot adopt.

But the existence of a son in *embryo* at the time of adoption

would not invalidate it : *Hanmant* v. *Bhima*, I.L.R., 12 B., 105 ; *Daulat* v. *Ram*, I.L.R., 29 A., 310.

So also the existence of a male descendant who is, by reason of any physical, moral, or intellectual defect, excluded from inheritance and incapable of conferring spiritual benefit, is no bar to adoption.

For, the status of sonship is constituted by the capacity to confer spiritual benefit and by the capacity to inherit : a child who is destitute of these capacities has not the status of son in the eye of the Hindu law.

It would seem therefore that the existence of a son who has renounced Hinduism or has, by becoming a *sannyási* or otherwise, rendered himself incapable of rendering spiritual service, is no bar to adoption. According to Hindu law such a son loses both the capacities constituting sonship ; although the *Lex loci* Act has conferred on such a son the capacity to inherit, yet it cannot be so construed as to deprive the father, of the power of adoption he has in the circumstances under the Hindu law.

A man having no son by his first wife, marries another in the hope of getting a son by the latter. It often happens that the first wife herself, who has failed to become the mother of a son, makes arrangements for her husband's second marriage and induces him to take another wife for the purpose of continuing the lineage and securing spiritual benefit. Such noble self-sacrifice can only be found among Hindu females. However, this second marriage also often proves barren ; and then the man has recourse to adoption. The most natural and reasonable course for him to follow is, to adopt and give a son to each of his two wives, and there are many cases of such double adoption in Bengal. After *Rangama's* case in which successive adoption of two sons was held invalid, the expedient hit upon to evade that ruling was to make simultaneous adoption of two sons for two wives, and there have been many instances of such adoption in Bengal. But simultaneous adoption was pronounced invalid in several cases, though the decision turned upon other grounds and was favourable to the adopted sons. But it has, at last, been judicially held invalid in the case of *Doorga* v. *Surendra*, I.L.R., 12 C., 686, affirmed on appeal by the Privy Council, see *Surendro* v. *Doorga*, I.L.R., 19 C., 513.

It is, however, worthy of special remark that notwithstanding the declaration by our courts of justice, that such adoptions were invalid, the adopted sons have been and are treated by

Hindu society as sons of their adoptive fathers. This anomaly is the effect either of ignorance of the sentiments and usages of the people, or want of sympathy with the same. It is also partly due to the absence of English translation of the texts of law bearing on the subject, which appear not only to permit but to enjoin plurality of adopted sons. See texts Nos. 5-8.

It has been held that a bachelor (*Gopal* v. *Narayan*, I.L.R., 12 B., 329) and a widower (*Nagappa* v. *Subba*, 2 M.H.C.R., 367), may make a valid adoption. In these cases a difficulty arises as to who should be deemed the maternal grand-sires of the boy adopted.

It has also been held that a minor may adopt and give authority to his wife to adopt: (*Rajendro* v. *Saroda*, 15 W.R., 548, and *Jumoona* v. *Bama*, I.L.R., 1 C., 289). It is not clear from these decisions whether it is sufficient for the competency of a minor that he should attain the age of discretion or that he should attain the age of majority according to Hindu law, *i. e.*, complete the fifteenth year. The validity of adoption by a minor is maintained solely on religious ground, and it is looked upon as a purely religious transaction, not affecting the civil rights of the adopter. This view may be quite true in Bengal where it has been held that sons acquire no rights to even the ancestral property during the father's lifetime; but it is not so where the Mitákshará prevails, inasmuch as the adopter's civil rights are materially affected by adoption, for the adoptee becomes the adopter's co-sharer with co-equal rights as regards ancestral property.

So strong, however, is the sentiment of ladies for the continuation of the family and lineage by adoption, especially in those instances in which the extinction of families has been prevented by adoptions, that they take the precaution of having authorities to adopt executed by infants as soon as they attain the age of discretion such as twelve or thirteen years, in favour of their infant wives. They are also made to give verbal permission to adopt, to their wives in the presence of witnesses.

A minor in Bengal under the Court of Wards cannot validly adopt or give authority to adopt, except with the assent of the Lieutenant-Governor, obtained either previously or subsequently.

Pollution on account of the death or birth of a relation does not vitiate an adoption made during it; the secular formalities of gift and acceptance may be performed by a person under it, while the religious part of the ceremony may be

delegated to a priest or a relation free from impurity : *Santap* v. *Rangap*, I.L.R., 18 M., 397 ; *Lakshmi* v. *Ram*, I.L.R., 22 B., 590 ; *Vedavalli* v. *Mangamma*, I.L.R., 27 M., 538, 539.

Capacity of females —According to the ancient Hindu law as well as to Roman law a woman was placed through her whole life under the tutory of her husband or his agnates when she ceased to be under the paternal power. She was not permitted to be *sui juris* at any period of her life. (See Texts, Nos. 17 and 18 *ante*, p. 84). But important rights were conferred on women by the Mitákshará and the Dáyabhága, so as to make their position almost equal to that of males, specially as regards the right to hold property. A great deal of misconception prejudicial to women, often arises from not distinguishing the later development of law from its earlier stages.

The text of Vasishtha (*ante*, p. 118) provides—"But a woman should neither give nor accept a son except with the permission of the husband." This text has been very differently construed by different schools. See *ante*, p. 33.

Some say that the husband's assent is absolutely necessary for an adoption by a woman. Of these again, some assert that the husband's assent must be given at the very time of adoption, so that according to them a widow cannot adopt at all. While others say that the word "husband" in the above text is illustrative, it means the tutor or guardian of the woman for the time being, that is to say, when the husband is alive his assent is necessary, and after his death the assent of his agnates who are his widow's guardians is necessary and sufficient for enabling her to adopt.

There is a third view entertained by some who maintain that adoption by the widow being conducive to the spiritual benefit of the sonless husband, his assent is always to be presumed in the absence of express prohibition.

It should be observed that according to those who maintain that a widow can adopt with the assent of her husband's kinsman, the husband's assent cannot be operative after his death, on the ground of his not being the guardian of his widow. But this distinction is not practically observed.

The doctrines of the different schools, as enforced by our courts at the present day are as follows :

In Mithilá it is absolutely necessary that the husband should give his assent at the time of adoption ; therefore a widow cannot adopt a *dattaka* son there.

In Bengal the husband's express assent is absolutely necessary and it is operative after his death, so as to enable a widow to make a valid adoption.

The Bengal doctrine has been applied to cases governed by the Benares school.

In Madras, Bombay and the Punjab a woman may adopt either with the husband's assent or with his kinsmen's assent if he died without giving any.

In Bombay widows whose husbands were not members of joint family, may also adopt of their own accord without any assent of either the husband or his kinsmen. It should be observed that in this case the husband's estate is vested in the widow. A widow succeeding to the estate not of her husband but of a *gotraja sapinda* under the rule established in *Lulloobhoy's* case, 7 I.A., 212, cannot make a valid adoption: *Datto* v. *Pandurang*, I.L.R., 32 B., 499.

A Jaina widow also can adopt of her own accord without any authority from either the husband or his kinsmen; the reason perhaps is that she becomes absolute owner of her deceased husband's self-acquired property inherited by her: *Sheo* v. *Dakha*, I.L.R., 1 A., 688; *Manik* v. *Jagat*, I.L.R., 17 C., 518; *Asharfi* v. *Rup*, I.L.R., 30 A., 197.

Nature of woman's right to adoption.—According to what is stated in the commentaries, it would seem that the widow adopts in her own right, but she being in a state of perpetual tutelage, the discretion which she is deemed to want is supplied by the *Auctoritas* of her legal guardian. According to some, the husband is the only guardian of a woman in the matter of having a son; while others regard adoption as an appointment of an heir and disposition of property, and therefore the assent of the husband's kinsmen whose interests are affected, is necessary and sufficient; there are some again who think that the widow inheriting the husband's estate is practically *sui juris* and is also competent to deal with the property for religious purposes, so she may, of her own accord, without the assent of anybody else make a valid adoption which is conducive to the husband's spiritual benefit, and which is an act of self-denial on her part, as by it she divests herself of the husband's estate which vests in the boy adopted.

Present view.—But the modern view regarding woman's capacity to adopt is, that she has no right herself, but that she is deemed to act merely as an agent, delegate or representative of her husband, or that she is only an instrument through

whom the husband is supposed to act: (*Collector of Madura*, 12 M.I.A., 435 = 10 W.R., P.C., 17). It should, however, be observed that the wife is the only agent to whom authority for adoption may be delegated; a man cannot authorize any other person to adopt a son for him. A joint power to the widow and other person or persons is invalid. But the widow's choice of a boy for adoption may be restricted by the husband by requiring the consent of persons named by him. If it turns out that such consent cannot be procured, she has no authority to adopt: *Amrito* v. *Surno*, 27 I.A., 128=I.L.R., 27 C., 996.

Accordingly the "assent of the husband" is looked upon as power. It has been held that a man who has a son in existence, and is therefore himself incapable of adopting a son, may nevertheless give a conditional authority to his wife to adopt a son, to be exercised in the event of the existing son dying without leaving male issue: 7 W.R., 392; I.L.R., 1 M., 174; 22 W.R., 121.

It follows, therefore, that the widow's right of adoption depends entirely on the power, and must accordingly be strictly pursued, *i.e.*, be subject to the restrictions and limitations that the husband may choose to impose in that behalf; *Mutsaddi* v. *Kundan*, 33 I.A., 55. If the widow is authorized to adopt one son, she cannot adopt a second, if the first adopted son dies; if he directs the adoption of a particular boy, she cannot adopt any other. In this manner, the authority is strictly construed. It would, however, be more consistent with the feelings of the Hindus, should the authority given by them be liberally construed, specially when it appears that they evince a general intention to be represented by a son, and a particular intention with respect to the mode of carrying out the same; in such a case, effect might be given to the former irrespective of the latter. This principle has been acted upon in *Lakshmi* v. *Raja*, I.L.R., 22 B., 996, and also in *Suryanarayana* v. *Venkataramana*, I.L.R., 26 M., 681. So also in the recent case of *Kannepalli* v. *Pucha* (33 I.A., 145) where the husband granted to his widow a power to adopt but placed no specific limitation thereto and it was clear that he desired to be represented by a son, it is held that the power was not exhausted by the adoption of one son.

If a person has more wives than one, and authorises one of them, she alone is entitled to adopt. If any other particular direction is laid down, that must be followed; should a general authority to all the wives be given, then there might be some

difficulty in case of disagreement and dispute. But if one is willing to loyally carry out the husband's wishes by adoption and the others are opposed for selfishness, then the former may adopt by giving notice to the latter: I.L.R., 18 C., 69. But all of them may agree in ignoring the authority.

For, however, solemnly a husband may enjoin his wife to adopt a son unto him, she is not legally bound to fulfil his dying request; her rights to the husband's estate are not in the least affected by her omission or refusal to adopt: *Uma Sunduri* v. *Sourobinee*, I.L.R., 7 C., 288.

An authority is void if it directs adoption under circumstances in which the man himself if living could not have adopted.

An authority may be given either verbally, or by a will, or by a writing called *anumati-patra* which must now be engrossed on a stamp paper of ten rupees, and must also be registered; *Mutsaddi* v. *Kundan*, 33 I.A., 55.

Power incapable of execution.—When a widow is authorized to adopt in the event of the death of an existing son, and the son dies, and the estate vests in the son's widow or any heir other than the first-named widow, then the first-named widow cannot adopt, as her power of adoption is then "incapable of execution and at an end," in other words, it is absolutely suspended so as to render an adoption then made absolutely void: *Pudma Kumari* v. *Court of Wards*, 8 I.A., 229=I.L.R., 8 C., 302; I.L.R., 10 M., 205; I.L.R., 17 C., 122. But the power revives when the estate reverts to, and becomes vested in her: *Bhoobunmoyee* v. *Ramkishore*, 10 M.I.A., 279; *Manikchand* v. *Jagatsettani*, I.L.R., 17 C., 518. But the Bombay High Court has construed that expression of the Privy Council to mean that the power is absolutely extinguished by the vesting of the estate in the son's widow, and cannot revive on the estate reverting to the widow of the donor of the power after the daughter-in-law's death: *Krishna* v. *Shankar*, I.L.R., 17 B., 164. This case is in direct conflict with the decision of the Calcutta High Court, in which an adoption in similar circumstances was upheld as valid, as by making the same the widow divested her own estate only: *Bykant* v. *Kisto*, 7 W.R., 392. It should, however, be observed that in such cases it must be owing to some accident that the son dies without making any provision for the continuation of the family. Having regard to the intention of the sons in such cases, that die making provisions in this respect, and to their feelings on the subject, it is

natural to presume the revival of the mother's power to be what the son would have assented to, had he expressed his views. Such revival appears to be agreeable to the sentiments of the Hindus. Besides, a Hindu widow inherits her husband's estate in the character of being the surviving half of her deceased husband; as soon as she gives up that character by re-marriage her estate comes to an end: her life is deemed as a continuation of her husband's life. Why should then the vesting in the son's widow, of the son's estate, or correctly speaking, the continuation of that estate in her, which had vested in her jointly with the husband since the time of their marriage, extinguish the mother's power; when it is unaffected by the vesting in the son, otherwise than being merely suspended. Moreover, the position of the mother is the same whether she inherits the son's estate just after his death, or after the death of his widow; the estate becomes vested in her as the son's heir in both cases, without any distinction whatever. It is impossible to conceive any reason or principle for difference, with respect to the continuance of the power. Why should it revive in the one case, and be extinguished in the other? It has been held that the son's marriage does not affect the mother's power, if his wife dies before him, and the mother succeeds on his death, she is competent to adopt: *Venkappa* v. *Jivaji*, I.L.R., 25 B., 306. Would it not be arbitrary to hold that she is not competent to adopt, if she succeeds after the son's widow's death?

Hence, that expression must be taken to be used with reference to the actual facts of these cases. The principle underlying their Lordship's decision appears to be that the adoption by a widow is the execution of the power of adoption which is a kind of power of appointment of the donor's estate: *Bai Moti* v. *Bai Mamu*, 24 I. A., 93 = I. L. R., 21 B., 709. If that estate is not ready to drop down on the adopted son at the time of adoption by reason of the same being vested in a person other than the adopting widow, the power must be deemed *non est*, and the adoption void.

Limit to exercise of power by widow.—Having regard to the religious belief and the feelings and sentiments of the Hindus that give to their widows power of adoption to be exercised on failure of male issue by reason of a begotten or adopted son dying after the death of the donor of the power, the question as to the limit of time within which, and the conditions subject to which, the power should be exercised must be

answered thus :—The widow's death is the limit of time within which, and the failure of male issue in the male line, and the vesting of the estate in the widow, are the only two conditions, subject to which, the power may be exercised ; whether the estate vests in the adopting widow just after the death of the son or after the death of his widow, or son, or even grandson, that makes no difference. There cannot be any doubt that the Hindu law on this subject should be enunciated in this manner, if the requirements of Hindu religion and the feelings of Hindus be respected. Is there then "anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu law" in allowing a Hindu widow to exercise the power of adoption subject to the said two conditions. The only difficulty in this matter is created by an observation of Lord Kingsdown, founded on an inaccurate view of the requirement of Hindu religion, expressed in these words,—"In this case, *Bhowanee Kishore* (the son after whose death the adoption was made by his mother during his widow's life) had lived to an age which enabled him to perform—and it is to be presumed that he had performed—all the religious services which a son could perform for a father."

The law on the subject, could not have been enunciated in the way it was done on the basis of the above view, had it been brought to their Lordship's notice that the same was not the correct view, and that the service absolutely necessary in a religious point of view, which a Hindu son has to perform for his father, and which is ordained as the debt every man owes to his paternal ancestors, is, to leave behind him a male issue for continuing their lineage. The religious belief of the Hindus that the continuation of male issue in this world is necessary for the spiritual benefit of the whole series of the paternal ancestors from the father to the founder of the *Gotra*,—is exemplified by the account of the interview of Jaratkáru the bachelor ascetic and the *Pitris* or spirits of his paternal ancestors, in the Mahábhárata, A'diparva A'stika-parva, chapter 13, and by the account of Ruchi in the Márkandeya-Purána chapter 95 *et seq.*. The Mahábhárata is a work of the sacred literature embodying the ideals of conduct religious, moral and social, for the guidance of the Hindus, among whom the knowledge of its contents is disseminated in various ways, regarded as religious rites, such as recitation of the original Sanskrit, or impressive speech in vernacular explaining it scontents, both made by learned Bráhmanas. It says that Jaratkáru in the

course of his pilgrimage once met the spirits of his own ancestors in a large pit, suspended with their heads downwards and feet upwards, by one tiny root of a bamboo clump ; seeing them in this plight, he was moved by sympathy and asked them who they were, and wherefore were they in that miserable position ? They said they were the ancestors of one Jaratkáru who was their only descendant on earth, and was leading a bachelor's life practising austerities, and was in consequence not likely to leave a son behind him ; and therefore they must, for want of any male issue after him, fall down very soon from heaven to the earth, and that was the reason of their miserable state. Thereupon Jaratkáru announced himself to them, who told him that he could save them by marrying and begetting male issue. He promised to do so, and did marry and become the father of A'stika, and so the ancestors were saved.

Márkandeya-Purána—which contains the Devi-Máhátmya also called Chandi, the recitation of which is regarded most auspicious,—is another sacred book of the Hindus. It describes a discourse between the (*Pitris*) or spirits of ancestors and Ruchi who had fully subdued all appetites for pleasure, and controlled his senses and led a virtuous life of celibacy. The *Pitris* endeavoured to induce him to take a wife for getting male issue, and when Ruchi raised the objection that it was difficult and hard for a poor old man like himself to get or take a wife, they spoke to him thus :—"Our downfall will assuredly come to pass, O son, and so also thy downward course, if thou dost not welcome our request," (and leave behind you a son). Ruchi was, however, induced at last to marry, and he became father of a renowned son : (Chapters 95-99 ; see Justice Pargiter's English Version, pp. 526 *et seq.*). There are many other sacred books ordaining the necessity of the existence of male issue in this world for the continuance of the heavenly abode of the *Pitris* or paternal ancestors in the male line. Thus it is clear that in a religious point of view, it is a spiritual necessity that the Hindu widow should be allowed to exercise the power of adoption when there is a failure of male issue ; for, it is the existence of male issue for the continuance of the lineage, and not the performance by such issue of any religious rites, which is required for the spiritual welfare of the ancestors. The widow is deemed the surviving half of her deceased husband, and her competency in this respect should be the same as that of her husband enjoining her to adopt on his behalf.

It is unreasonable to suppose that the Lords of the Judicial

Committee would adhere to their observations that partake of the character of *obiter dicta*, when the same were based upon an erroneous view of the religious belief of Hindus. All that has been held by their Lordships, is, that an adoption made by a widow is invalid, if at the time the estate is vested in the son's widow or some other person whose estate she cannot defeat by the exercise of the power. Although there are expressions in the judgments appearing to restrict the widow's power within too narrow limits, such as that "the power is incapable of execution and at an end," when the estate is vested in the son's widow : they are not to be taken literally as if their Lordships were legislating, but should be confined to the facts of the particular cases. Their Lordships themselves observe that the fact of the descent being cast would make no difference "unless the case fell within the authority of that of *Bhoobunmoyee* v. *Ram Kishore*, (10 M.I.A.,279) in which it was decided that the son having died leaving a widow in whom the inheritance had vested, *the mother could not defeat the estate which had so become vested by making an adoption*" : *Raja Vellanki* v. *Venkata*, 4 I.A., 9=I.L.R., 1 M., 186. It has already been shown that there is no difference in the mother's succession, whether she gets the son's estate immediately after the son's death, or after the death of the son's widow who inherits first and after her the mother. It would be arbitrary to say that the mother is competent to adopt in the former case, but not in the latter ; it is absolutely impossible to find any rational principle for such a distinction excepting the view that a married son has exhausted the performance of all the religious services that a son may render to his father,—which must be discarded, as being incorrect : *Ram* v. *Surbanee*, 22 W.R., 121, 123. In this case Mitter J. held that the view taken by the Judicial Committee that a married son exhausted all the spiritual benefit that a son can confer on his father—is supported by no authority, and is contrary to the usages of Hindus : and in the case of *Kannepalli*, 33 I.A., 145, 154, the Judicial Committee have approved of the observations made by Mitter J. on this question.

But, even after this case, the Calcutta High Court thought itself bound to follow the said *obiter dicta* of the Judicial Committee, and to set aside the adoption in a case where the estate had vested in the son's widow, and on her death passed to her mother-in-law who then made the adoption declared invalid by the High Court : *Manikyamala* v. *Nanda*, I.L.R., 33 C., 1306.

That the attainment by a son, after the father's death, of ceremonial competency by marriage, investiture or otherwise before his death, is no bar to adoption, is held by Justice Ranade who explains that the real limitation on a mother's right to adopt is based by the whole current of recent decisions solely on the question whether the widow's act of adoption derogated from her own rights or the vested rights of others : *Venkappa* v. *Jivaji*, I.L.R., 25 B., 306, 312. In a recent case in which a great number of authorities including this decision were cited, with respect to the effect of the attainment of ceremonial competency, the Judicial Committee observed that they appeared to their Lordships to be rather in favour of than against the validity of the adoption ; but their Lordships did not express any opinion on the question excepting that it is open to controversy : *Verabhai* v. *Bai*, 30 I.A., 234, 237.

In a latter case, (*Ramkrishna* v. *Shamrao*, I.L.R., 26 B., 526) however, in which a widow—whose husband had predeceased his father, and who succeeded to her father-in-law's estate which had devolved at first on her son, and then on her grandson who died unmarried, and lastly on herself as heiress of her grandson,—had adopted a son, three learned Judges of the Bombay High Court have held that the adoption was invalid, relying on the *obiter dicta* of the Privy Council in *Bhoobunmoyee's* case and also in other cases, in which what was actually decided, was, that an adoption made by the mother-in-law when the estate is vested in the daughter-in-law is invalid, and relying also on an earlier case of the same court (I.L.R., 17 B., 164) in which the adoption was made by the mother-in-law who succeeded to her son's estate after the death of the daughter-in-law who had inherited the same at first.

It has already been said that the *obiter dicta* were made under the misconception of the religious ideas and sentiments of the Hindus. There is no reason why the law should not be enunciated consistently with them, in the manner submitted above. If the foundation, namely, the exhaustion of religious services by a son attaining a particular age,—fails, then the whole superstructure of the *obiter dicta* must necessarily fall. And it would not be consistent with the true loyalty and respect due to the Lords of the Judicial Committee to hold that their Lordships laid down an arbitrary rule founded on no principle, and that the same should be adhered to, notwithstanding the rejection of the limitation of ceremonial competency, by reason of the same being inaccurate, which alone did form the principle

of the distinction. It is a question of fact not of law; and the inaccuracy of the view is due to the materials for the right view not being placed before their Lordships. In this connection the following observations made by the Privy Council in an early case, should be borne in mind, namely,—"The interest of sovereigns, as well as their duty, will ever incline them to secure, as far as it is in their power, the happiness of those who live under their government, and no person can be happy whose religious feelings are not respected." *Ramtonoo* v. *Ramgopaul*, 1 Knapp 245=1 P. C. J., 6.

There is no limit of time for the exercise by a widow in whom her husband's estate is vested, of the power of adoption; she may adopt at any time she pleases, when the estate is vested in her. See *Mutsaddi* v. *Kundan*, 33 I.A., 55 and *Giriowa* v. *Bhimaji*, I. L. R., 9 B., 58. But it seems that there must be some limit when the husband's undivided coparcenary interest becomes vested on his death in the surviving male members of the family according to the Mitákshará.

When widow cannot adopt.—As a widow adopts a son unto her husband, in her capacity of being his surviving half, she cannot adopt after re-marriage; nor when she is pregnant in adultery.

Adoption by infant widow.—As an adoption by the widow divests her of her husband's estate, therefore in an adoption by a young widow, whether infant or not, the court will expect clear evidence that at the time she adopted, she was informed of her rights and of the effect of the act of adoption upon them; and if it finds that coercion, fraud or cajolery was practised upon her to induce her to adopt, or that she was not a free agent, or that there was suppression or concealment of facts from her, it will refuse to uphold the adoption. See *Somasekhara* v. *Subhadra*, I. L. R., 6 B., 524 and *Ranganaya* v. *Alwar*, I. L. R., 13 M., 214.

Adoption by Kinsman's assent.—Where a widow may adopt with the assent of her deceased husband's kinsmen, there if the husband was a member of an undivided family, the assent must be sought from the surviving male members of the family. In such a case the assent of the senior and managing member may be sufficient; but the assent of a divided kinsman will not be sufficient: *Sri Virada* v. *Sri Brozo*, I.L.R., 1 M., 69; *Subrahmanyam* v. *Venkamma*, I.L.R., 26 M., 627. It is not necessary that all the kinsmen should give their assent; the assent of the majority is sufficient in the absence of improper considerations,

such assent should be presumed to have been given on *bona fide* grounds : *Venkata* v. *Anna*, I.L.R., 23 M., 486. The proper person to give the requisite assent is he under whose guardianship the woman should remain according to the circumstances in each case. If there is the father-in-law, his assent is sufficient : *Collector of Madura* v. *Moottoo*, 12 M.I.A., 397=10 W. R., 17 : *Vithoba* v. *Bapu*, I. L. R., 15 B., 110. If the husband was separate, the widow must apply for the assent of the nearest Sapindas, and then it would seem that the consent of the presumptive reversionary heir must be taken : I. L. R., 26 M., 627.

The assent to be legally sufficient should be given after the exercise of discretion, and not from any corrupt motive, I. L. R., 1 M., 69 (82). Where a widow who by representing to her husband's *sapindas* that she had her husband's authority induced them to give their consent to an adoption made by her, but who fails to prove her husband's authority, cannot support the validity of the adoption by the consent of *sapindas* who thought they were only ratifying the husband's authority : *Jonnalagadda* v. *Jonnalagadda*, 34 I.A., 22.

Adoption without assent.—In Bombay a widow in whom her husband's property is vested, may adopt without any authority from her husband or assent of his kinsman, in the absence of express prohibition by her deceased husband, provided she does not act capriciously or from any corrupt motive : *Ramji* v. *Ghamau* I.L.R., 6 B., 498. The husband's assent is presumed from the absence of express prohibition. But when the husband's estate is vested in other relations, she may adopt only with their assent, if the husband gave none : *Payapa* v. *Appanna* I.L.R., 23 B., 327. But acquiescence implied by mere presence at the ceremony and the absence of any objection is not equivalent to consent : *Vasudeo* v. *Ram*, I.L.R., 22 B., 551.

When there are more than one widow, the senior alone may adopt without the assent of the junior widow, but not *vice versa*. The senior widow's preferential right depends on her becoming the *patni* or indispensable associate for religious purposes since her marriage,—a position not affected by subsequent marriage of another wife : *Padaji* v. *Ram*, I.L.R., 13 B., 160.

Dattaka : who may give in adoption.

The father and the mother of a boy are competent to give him away in adoption. The concurrence of both would be desirable. But the father may act even against the will of the mother. The mother, however, cannot give without the assent

of her husband while he is alive ; but after his death she can give her son in adoption, in the absence of express prohibition by her husband, See *Jogesh* v. *Nritya* I.L.R., 30 C., 965= 7 W.N., 871.

Thus you see that there is a great distinction between the giving and the taking of a boy in adoption, as regards woman's capacity in that behalf. Her power is almost unrestricted as regards *gift*, but not so as regards acceptance ; though both seem to be dealt with in the same way, and the assent of the husband is required by Vasishtha (Text No. 2), as well to the *gift* by the wife of a son in adoption, as to the *acceptance* by her of a boy for adoption as son unto the husband.

But as adoption is a kind of advancement of the boy who is to become entitled to a rich inheritance, and as such beneficial to him, it may be safely left to the discretion of a mother to make a gift of her child for adoption, and the father's assent required by the text of Vasishtha may be presumed in the absence of express prohibition.

But a widow has no power, after her re-marriage, to give in adoption her son by her first husband. The Bombay High Court have held that the right to give a boy in adoption is a right of disposition, a portion of *patria potestas*, which comes to the widow by reason of her connection with her deceased husband's estate, but which is lost by re-marriage ; I.L. R., 24 B., 89. The capacity to give may also be regarded as an incident of guardianship which she loses by re-marriage. But in a recent case the Bombay High Court have held that where the husband authorized his widow to give their son in adoption, the widow can make a valid gift in adoption even after her re-marriage : *Putlabai* v. *Mahadu*, I.L.R., 33 B., 107.

As regards the gift of an only son, the effect of which would be the extinction of the family, and the cessation of spiritual benefit derived from the son, it is doubtful whether this presumption of assent in the absence of express prohibition, can legitimately be made in such a case. This appears to be the principle of the distinction, upon which Sir Michael Westropp's view is based, namely, "that assuming that a man's only son may be given in adoption by himself, yet if he has not expressly given to his widow an authority to make such a gift, it cannot be implied by law." But if the father was poor, he may be fairly presumed to have preferred the son's secular benefit by adoption, to the spiritual benefit of himself and his ancestors. And the mother's action in this respect may be taken to be

governed by the same considerations, as that of the father. The attention of the Judicial Committee seems to have not been directed to the principle underlying the distinction which is therefore pronounced by their Lordships to have been quite novel. And their Lordships approved of the view expressed by the Madras High Court that the wife's power, at least with the concurrence of *Sapindas* in cases when that is required, is co-extensive with that of the husband : *Sri Balusu* v. *Sri Balusu*, 26 I.A., 113, 128. But it should be observed that in this case there was the requisite assent to enable the mother to make the gift ; for, according to the guardianship theory adopted in Madras, the husband's kinsman's assent is sufficient.

Considering the consequences of adoption which appears to operate as civil death of the boy as regards the family of his birth, the law confers on the parents only, the power of making a gift in adoption. A stepmother, or any other relation, cannot make such a gift : *Papamma* v. *Venkatadri*, I.L.R., 16 M., 384.

Nor can the parents delegate this power to any other person. But the gift and acceptance form the essential part of the ceremony ; if the parents have performed the same they may delegate the religious portion to any relation or to their priest for performance and completion of the adoption : *Lakshmi* v. *Ram*, I.L.R., 22 B., 590. When a Bráhmana died after having taken a boy in adoption, but died before the ceremony of the Datta-Homam was performed, and the same was performed by his widow, the adoption was held valid : *Subba* v. *Subba*, I.L.R., 21 M., 497.

The power which the Hindu law confers on a father to give away his son in adoption is not lost by a Hindu pervert to Islamism. If he thinks it beneficial to his son to remain a Hindu, and to be adopted as a son to a Hindu adopter, he is competent to give away the son in adoption. He may be a party to the secular gift and acceptance, and delegate to a relation the performance of the religious portion of the ceremony of adoption. In a case in which the natural father after having adopted the Mahomedan religion was desirous to give his son in adoption and authorized his Hindu brother to make the gift, and then died, and subsequently the boy was given by his said uncle, it has been held that the father was competent to delegate the authority, and the adoption was good : *Sham* v. *Santa*, I.L.R., 25 B., 551. On the same principle it has been held that a Hindu becoming a *Bráhma* may give his

son in adoption, the religious ceremony being performed by a Hindu relation ; the son is entitled to revert to Hinduism with the father's consent : *Kusum* v. *Satya*, I.L.R., 30 C., 999= 7 W. N., 784.

Dattaka : who may be given and taken in adoption.

Only son.—With respect to eligibility for adoption, the only rule on the subject, propounded by the well-known legislators, is the prohibition contained in the above text No. 2 (*ante*, p. 118) of Vasishtha, forbidding the adoption of an only son. This rule is merely recommendatory in character, and it was held to be so by all the superior courts in India till 1868 A.D., when for the first time, it was held by a Division Bench of the Calcutta High Court that the adoption of an only son is invalid. One of the Judges was Justice Dwarkanath Mitter, but being a "lawyer without Sanskrit" he was not in a better position than the European Judges holding the contrary view, as regards the interpretation of Hindu law. See *Raja Opendur* v. *Ranee Bromo*, 10 W.R., 347 ; and I.L.R., 3C., 443. The Bombay High Court also had, since that decision, been expressing their opinion against the adoption of an only son till a Full Bench of that Court did in 1889 A.D., hold such adoption to be invalid : *Wâman* v. *Krishnáji*, I.L.R., 14 B., 249. But such adoption has all along been held valid in Madras, N.-W. Provinces and the Punjab. In 1892, a Full Bench of the Allahabad High Court did, upon a reconsideration of the law and the previous cases, come to the conclusion that the adoption of an only son is valid : see *Beni Prasad* v. *Hardai Bibi*, I.L.R., 14 A., 67. The very fact of there being so much difference of opinion, proves the rule to be of moral obligation only.

But this controversy has been set at rest by the decision of the Judicial Committee holding the adoption of an only son to be valid : *Sri Balusu* v. *Sri Balusu*, 26 I.A., 113. This view is perfectly consistent with what is deducible from the Sanskrit works on law ; and it is due to misapprehension of their meaning, that some learned writers maintain the contrary view.

Some other similar rules held admonitory.—There are some commentators who say that a man should not give away his son in adoption when he is not in distress, and that he should not give in adoption his eldest son or one of two sons. But these are considered to be merely directory and not imperative.

The Dattaka-mímánsá and still later commentaries say that a man should adopt his brother's son if available for adoption,

in default of him he should adopt a *sapinda*, in his default a *Samánodaka*, and in default of an agnate relation he should take one belonging to a different *gotra* or family. But this rule relating to preference in selection has been held by the Privy Council to be merely recommendatory : *Wooma Daee* v. *Gokoolanund*, I.L.R., 3 C., 587.

Prohibition of certain relations for adoption by twice-born classes.—Nanda Pandita and his followers maintain that certain relations such as a brother or an uncle, or the son of a daughter, or of a sister, or of the mother's sister, or the like, should not be adopted by a twice-born person. No such rule is laid down in any earlier commentary. Nanda Pandita deduces the rule from two texts of doubtful import, which are not noticed by any commentator of note, and one of which is said to be a text of Saunaka and the other of Sákala, neither of whom is recognized as legislator, and whose names are not found in most of the commentaries on positive law. The texts are as follows :—

(1.) दौहित्रो भागिनेयश्च शूद्रेषु क्रियते सुतः ।

ब्राह्मणादि-त्रये नास्ति भागिनेयः सुतः क्वचित् ॥ शौनकः ।

which means,—"A daughter's son and a sister's son are made sons by *Súdras* : among the three tribes beginning with the Bráhmana, a sister's son is not (made) son somewhere (or anywhere)."—Saunaka.

The second line of this couplet is not found in many copies. This passage is found, in a book on ritual, the authorship of which is attributed to Saunaka, but which on perusal would appear to be a modern production. It does not profess to deal with law ; but while dealing with the ritual of *Játa-karma* or the natal ceremony, it professes to describe the ritual of adoption, and the above passage and some others relating to adoption are found after the description of the said ritual. In the course of describing the ritual, it is said after the formal gift and acceptance have been completed, that the boy *bearing the reflection of a son* पुत्रच्छायावहं should be adorned &c., and brought within the house where *homa* should be performed.

(2.) सपिण्डापत्यकश्चैव सगोत्रजमथापि वा ।

अपुत्रको द्विजो यस्मात् पुत्रत्वे परिकल्पयेत् ।

समानगोत्रजाभावे पालयेत् अन्यगोत्रजं ।

दौहित्रं भागिनेयञ्च मातृस्वसृसुतं विना ॥ शाकलः ।

which means,—"A sonless twice-born man *shall* or *should* adopt, a son of a *Sapinda* or also next to him a son of a *Sagotra* ; and in default of the son of a *Sagotra*, *shall* or *should* adopt one born of a different *gotra*, except the daughter's son, the sister's son, and the mother's sister's son."—Sákala.

From what book of Sákala's these lines are quoted by Nanda Pandita, or whether Sákala is the author of any book, no one can tell.

From the above couplets of Saunaka and Sákala and the words "*bearing the reflection of a son*" qualifying the boy, Nanda Pandita deduces the rule that amongst the twice-born classes such a boy should be adopted, as could be begotten by the adopter on the boy's mother by appointment to raise issue in the Kshetraja form, and accordingly he prohibits the adoption of the relations mentioned above.

Sutherland, the learned translator of the Dattaka-mímánsá and the Dattaka-chandriká, formulates the rule thus,—That a twice-born man cannot adopt a boy when the relationship between the boy's mother and the adopter is such that there could have been no valid marriage between the adopter and the boy's mother, had she been unmarried. This, however, does not correctly represent Nanda Pandita's view ; for, this rule cannot exclude the relations whom he has expressly excluded.

Discussion as to there being any such binding rule.—If what Nanda Pandita says be accepted as authoritative and imparative, then the utmost that can be said is, that the relations to be avoided are only those enumerated by him. If on the other hand, it be open to us to examine the texts with a view to see whether there is any binding rule prohibiting the adoption of any relation, then the question cannot but be answered in the negative, as has been done by the Full Bench of the Allahabad High Court (I.L.R., 17 A., 294), for the following reasons :—

(1) The above text of Saunaka does not embody any command or चोदना in the language of the Mímánsá but it is merely a statement of facts, or what is called in Sanskrit a भूतार्थवादः । As regards the words "*bearing the reflection of a son*" forming an adjective of the boy who has already been formally given and accepted, they can fairly be taken to indicate only

the effect of the ceremony already performed; but they can by no means imply the meaning forced upon them by Nanda Pandita, who has rather evolved it out of his inner consciousness, than from the natural import of the words.

(2) Then, as to Sákala's text, it should be observed in the first place, that the object of the text is not to lay down who should or should not be adopted, but to declare who should be adopted first, who next, and who last: or in other words the order of preference in the matter of selecting the boy to be adopted. It says, you *shall* or *should* adopt from amongst the *Sapindas*; in their default, from amongst the distant *Sagotras* or agnates; and in default of agnates, from amongst those belonging to a different *gotra* such as cognates; then follows the exception, "except the daughter's son, the sister's son, and the mother's sister's son." Now the question arises, to what does the exception relate? It admits of two constructions, one of which is logical (अर्थविचार), and the other grammatical (शब्दविचार).

If the text be construed *logically* or having regard to its true intention, the rule may be put thus—"If a *Sapinda* is available for adoption you *shall* or *should* not adopt a distant *Sagotra* or agnate; and if an agnate is available for adoption you *shall* or *should* not adopt one belonging to a different *gotra* or family, except the daughter's son, the sister's son, or the mother's sister's son,"—that is to say, the daughter's son, the sister's son, and the mother's sister's son, though belonging to a different *gotra*, may be adopted although there may be an agnate available for adoption: thus, the exception relates to the *order* which is the subject of the rule. And this construction is consistent with what is laid down by all the sages dealing with positive law. For, they recognize the twelve kinds of sons; therefore a daughter's son may according to them, be the son of the maternal grandfather, as *Putriká-putra* or appointed daughter's son, or as *Kánína* or maiden daughter's son. Hence there is no reason why the same daughter's son cannot be his maternal grandfather's son as *Dattaka* or given son. Therefore, consistently with what is necessarily implied by these well-known legislators, Sákala cannot be taken to prohibit the adoption of "the daughter's son" who has been declared to be most eligible as a subsidiary son under the name of *Putriká-putra* declared to be equal to the *Aurasa* or real legitimate son,—and consequently, of "the sister's son and the mother's sister's son."

Next, if the text be construed *grammatically*, then the ex-

ception is to be connected with the verb "*shall* or *should* adopt," and the text must be put thus:: "In default of an agnate, he *shall* or *should* adopt one belonging to a different *gotra* except (or but not) the daughter's son, the sister's son, and the mother's sister's son,"—therefore the prohibitory proposition or sentence must *grammatically* be formed with the verb "*shall* or *should* adopt" as used in the text, and must stand thus,—"But he *shall* or *should* not adopt the daughter's son, the sister's son, and the mother's sister's son."

It should, however, be borne in mind in this connection, that the Privy Council have declared the rule propounded by Sákala relating to the order of preference, to be directory only, I.L.R., 3 C., 587. Therefore, although the word पालयेत् in Sákala's text may, having regard to its form, mean either "*shall* or *should* adopt." It must now be taken to mean "*should* adopt:" consequently, the very same word पालयेत् or "*should* adopt" being grammatically connected with the exception, the prohibitory sentence must mean, "But he *should* not adopt the daughter's son, the sister's son, and the mother's sister's son"—that is to say, the exception also must be a precept of moral obligation, like the rule. In this connection the following Sanskrit rule of construction should be borne in mind, namely सकृदुच्चरितः शब्दः सकृदर्थं गमयति or "a word once pronounced can convey only one meaning:" hence, although the word पालयेत may mean either "*shall* adopt" or "*should* adopt," it being authoritatively settled by the decision of the Privy Council that it means "*should* adopt" in connection with the rule, it cannot but bear the same meaning when grammatically connected with the exception.

This interpretation appears to be unexceptionable and unassailable from a Sanskritist's as well as a lawyer's point of view: its correctness, however, depends upon the view adopted by the Privy Council, of the rule relating to the order of preference for adoption. And the view taken by the Judicial Committee appears to be supported by the Mímánsá. Those who feel curiosity to study the subject with details, are referred to Jaimini's Mímánsá with Savara-Svámi's Bháshya, Ch. I, Pada or Section 2, and Ch. XI, and specially to विधिविलिङादिकरणम् or "the topic of recommendations in the form of imperative rules," Ch. I, 2, 19 *et seq.* In this topic is discussed the question, whether precepts like the following are imperative or only recommendatory, namely, उदुम्बरो यूपो भवति, &c., or "A sacrificial post is made of (the wood of) the Udumvara tree, &c.:" and the conclusion arrived at is, that it is merely recommendatory, one of the reasons assigned being

विध्यसम्भव श्रुतिसम्भव—"the improbability of the precept being imperative, and the probability of its being a recommendation." A sacrificial post is but a means to an end, it is necessary for tying the animal to be sacrificed ; any strong wood would be sufficient for the purpose, therefore the above precept is interpreted to be a recommendation only. Similarly, an adopted son is only a means to an end, and the direction that a brother's son if available should be adopted, in his default a *Sapinda*, and so on,—is, for similar reasons, merely recommendatory. The truth is, that there are various reasons for considering a rule to be recommendatory only (अर्थवाद: or प्रसज्यप्रतिषेध:) and not imperative (विधि: or पर्युदास:),—हेतुवच्चिगद: or "a precept with the reason for it," being only one of the tests for discriminating it as directory : and it is impossible for an unbiased and unprejudiced mind that is versed in Sanskrit law, to find fault with the rational view taken by the Privy Council, of the rule relating to the order of preference for adoption, and with its corollary that the exception to it is of the same character with the rule, having regard to the language of the text, and to the rules of construction.

(3) It is conceded that the adoption of the daughter's and the sister's son is valid amongst the *Súdras*. From this it may, according to Sanskrit rules of construction, be, very fairly inferred that such adoption amongst the twice-born classes is only censured, and not absolutely interdicted. But the Bombay High Court, relying on a hasty conclusion come to by Sir Raymond West, an eminent Judge and Sanskritist, gets rid of that circumstance by observing that "the Hindu Law regarded the *Súdras* as slaves, and their marriages as little better than concubinage": see I.L.R., 3 B., 273 (289). With great deference to Sir Raymond, I regret to say that the above proposition is entirely erroneous ; for, the Smritis or Codes of Hindu law did not regard the *Súdras* as slaves, and their marriages as concubinage.

According to the Smritis, every man is by birth a *Súdra* ; it is by learning the sacred literature, that a man becomes twice-born. The privilege of studying the sacred literature is, no doubt, denied to the *Súdras* as well as to the females of the so called twice-born classes. But the status of being *twice-born* depends on the acquisition of knowledge of the sacred literature. Manu (Ch. III, verse 1) ordains that a twice-born man shall abide with the preceptor, and study the Vedas for thirty-six years, or a half or a quarter of that period, or until know-

ledge of the same is acquired. The consequence of omitting to do the same is thus declared by Manu (Ch. II, 168):

योऽनधीत्य द्विजो वेदम् अन्यत्र कुरुते श्रमं ।
स जीवन्नेव शूद्रत्वम् आशु गच्छति सान्वयः ॥ मनुः २, १६८ ।

which means,—"That twice-born man, who without studying the Vedas, applies diligent attention to anything else, soon falls even when living, together with his descendants, to the condition of a *Súdra*." Hence the males of the twice-born classes, who have no knowledge of the sacred literature, are like their females, in the same category as *Súdras*, *i. e.*, they remain such as they are by birth. The majority of the so-called twice-born classes have accordingly become long since reduced to the position of *Súdras* by reason of neglecting the study of the Vedas from generation to generation. It follows, therefore, that according to the Smritis, the *Súdra* law should be applicable to them who are twice-born by courtesy only, and hold the position of *Súdras*. Our Courts of Justice are called upon, therefore, to enquire, in every such case, whether the so-called twice-born litigants are really so, before applying to them a rule different from that applicable to the *Súdras*; and in ninety-nine cases out of a hundred, it will be found that the parties, though twice-born by courtesy, are really *Súdras* by qualification. There are, no doubt, some modern fabrications called *Upa Puránas*, and concocted for the purpose of avoiding the foregoing evil consequence propounded by the Smritis,—which say that the study of the Vedas for a long time is a practice which is to be eschewed in the Kali age (see *ante*, p. 9), and accordingly a farce of the Vedic study for a day or two, is now made when the *Upanayana* ceremony is nominally performed, and fittingly called investiture with the sacred cord, though it really meant commencement of the study of the Vedas, the literal import being *taking* (a boy and handing him over) *to* (a teacher of the Vedic literature). But these spurious books forged and thrust into prominence by the Pandits of the Mahomedan period for the benefit of the unlearned members of their class, cannot be regarded as any authority by a British court of justice. The *Puránas* and specially the *Upa-Puránas* are no authority in law. The Courts of Justice are to be guided by the Smritis and the ancient customs only, as is declared by Yájnavalkya (ii, 5) while defining a *cause of action*, thus—

• स्मृत्याचारव्यपेतेन मार्गेणाधर्षितः परैः ।

यावेदयति चेद् राज्ञे व्यवहार-पदं हि तत् ॥ याज्ञवल्क्यः २,५ ।

which means,—"If a person wronged by others in a way contrary to the Smritis or the customs, complains to the king, that is a topic of litigation (or cause of action)." Our courts of justice, if rightly advised, will not listen to an unreal distinction, although the degenerate Bráhmanas by courtesy might be loudest in advancing their pretension to a false and artificial superiority

A perusal of the Smritis will convince the reader that the *Súdras* as such were not regarded as slaves. Any person whether *Bráhmana* or *Súdra* might be a slave in the recognized modes such as capture in war, or sale by the father ; (see Manu viii, 415). While dealing with the modes of acquiring subsistence by the different classes, Manu says, that a *Súdra* is to subsist by serving the twice-born classes, or by the practice of mechanical arts. But is this service the same thing as slavery? Not a word to that effect can be found in the Smritis, though no doubt the holders of service are compared to dogs, to whatever caste they may belong. There is however, a passage in the *Brahma-Purána*, which depicts the *Súdras* subsisting by service, as slaves, and that is the only slender basis on which is founded the conclusion that the Hindu Law regards the *Súdras* as slaves. But that passage does not apply at all to the *Súdras* practising the mechanical arts. Besides, slavery has been abolished within living memory, although the importation of slaves into British India, and the recognition of slavery by Government officials, were prohibited by earlier Enactments : slavery was abolished in 1860 A.D. by the Indian Penal Code. Therefore if the position of *Súdras* had been that of slaves under the Hindu Law, that state of things would have continued down to the abolition of slavery ; but has any one ever heard that the general body of the *Súdras* or any section of them was *then* emancipated ? The British Government has undoubtedly emancipated the people from moral thraldom. But no particular caste of Hindus was under physical thraldom at the time slavery was abolished, though there were certainly some Hindu slaves whose caste is unknown, that were liberated by British Indian legislation.

The Hindu legislators were anxious to provide every man with a source of maintenance ; accordingly they ordained that

the illegitimate son of a twice-born man by a *Súdra* woman not married by him, is entitled to maintenance from his estate, and as regards *Súdra* they provide that an illegitimate son may, by the *Súdra* father's choice, get an equal share with a real legitimate son of his, and that after his death, he is to get a half share in comparison with what is obtained by his legitimate brothers; and that in default of legitimate heirs down to the daughter's son, he may get the whole property. Now it should be observed that *Súdras* were all poor men at the time when the above rule was laid down: the only property they might leave behind them would be a dwelling house, and if he practised any mechanical art, also the tools of such art. Consequently a *Súdra's* illegitimate son by getting even his whole property, obtained considerably less than a Bráhmana's illegitimate son who was entitled to maintenance. It is difficult to appreciate the process of reasoning by which, from the above provisions for the benefit of a *Súdra's* illegitimate son, any inference can be drawn that the marriages of *Súdras* are licensed concubinage. Yet that is the only ground upon which that remark of Sir Raymond's is founded: there is nothing else in Hindu Law, which can even remotely lend any support to such a disparaging view as that. If we turn our attention from the law-books to the actual usage amongst the Hindus, we do not find anything peculiar to the *Súdras*, that may justify that contemptuous conclusion. On the contrary, having regard to the actual practice, the disparaging remark might be applied to marriages among the Nair Bráhmanas in Deccan; and also among a certain section of Bengali Bráhmanas by courtesy, who used to pass through the ceremony of marriage with scores of women, some times exceeding a hundred, though they were too poor to provide even one of them with maintenance and residence.

Besides, it is difficult to understand the logical sequence between the adoption by *Súdras* of their daughter's and sister's sons, and the fact (even if admitted to be correct) of the Hindu Law regarding *Súdra* marriages as concubinage. If the Hindu Law had provided no prohibited degrees for marriage amongst the *Súdras*, and had allowed them to marry their daughters and sisters, then and then only could the distinction have been accounted for in the manner attempted to be done. For, in the prurient imagination of Nanda Pandita and the like, the adopted son is to be capable of being begotten by the adopter on the son's natural mother, by appointment to

raise issue, merely for the purpose of justifying the prohibition propounded by him, for the first time.

For, even according to him, the fiction of adoption, is not, that the boy is begotten by the adopter on the boy's natural mother. Because if that had been so, the boy ought to have retained his relationship to his natural mother and her relations. On the contrary it is admitted on all hands, that the real fiction of adoption is, that the boy is begotten by the adopter on his own wife, and it is on that footing that the adopted son's right of inheritance from the adoptive mother and her relations has been recognized, and that from his natural mother and her relations, denied to him. In performing the Párvana Sráddha he is to offer *pindas* or oblations to his adoptive mother's sires, not to those of his natural mother: see Dattaka-Mímánsá vi, 50. So the prohibition is utterly inconsistent with this theory of adoption, now universally accepted.

(4) There is a text of Yama, which appears to support the adoption by a twice-born person, of his daughter's son :—

दौहित्रे भ्रातृपुत्रे च होमादिनियमो न हि ।
वाग्दानादेव तत् सिद्धिरित्याह भगवान् यमः ॥

which means,—"The Homa or the like ceremony is not (necessary) in the case (of adoption) of the daughter's or the brother's son ; by the verbal gift (and acceptance) alone, that is accomplished : this is declared by the Lord Yama."—This text was relied on by some Sástris of Bombay in 1821 A.D., who were consulted in the case of Huebut Rao, 2 Borrodaile 75, (85). I have not found it cited in any commentary of note; but Pandit Bharat Chandra Siromani used to repeat it to his pupils, and it is also cited in some unimportant works on adoption, see the said Pandit's compilation, called Dattaka-Siromani, pp. 45, 92, 244 and 246. This text, however, is not found in the Code of Yama, such as is now extant and published; it does not contain a single passage on positive law; nor do the published Codes of Vrihaspati and Kátyáyana, although numerous texts from them are cited by commentators on positive law, none of which is found in the published editions. Another text of Yama, cited in the Dáyabhága, Ch. XI, Sec. 5, para. 37, was the subject for consideration by a Full Bench of the Calcutta High Court (I. L. R., 1 C., 27), and the learned judges were anxious to see the context for the purpose of ascertaining the true meaning of that text (I. L. R., 1 C., 38), and I was consulted and asked by an

eminent judge of that Bench to procure the Code of Yama. I saw Pandit Bharat Chandra Siromani on the subject, but he said that the complete Code of Yama containing the chapter on positive law, he had never seen, and could not be found anywhere, so far as he was aware. Hence the above text can not be supposed to be spurious, simply because it is not found in the published incomplete Code of Yama; it seems to have been traditionally known in the Sanskrit law-schools, when we find it cited by the Bombay Sástris and a Bengali Pandit.

Nor can it be contended that this text of Yama should be construed to refer to the *Súdras* only, and not to the twice-born classes. Because, in construing passages of law, we must take into consideration the religious disability of the *Súdras* under the Codes, to whom the privilege of performing sacrifices was denied, see Jaimini's Mímánsá (6, 1, 25 *et seq.*) the topic of incompetency of *Súdras* to perform sacrifices or यागे शूद्रस्य अनधिकाराधिकरणम्। This view is entertained even now, with this difference only, that certain modern writers say that the *Homa* and the like ceremony may be performed by the *Súdras*, vicariously through the Bráhmana priests. But the Calcutta High Court and the Privy Council have held that this modern view, however beneficial and profitable it might be to the Bráhmanical class subsisting by priest-craft, is not binding on the *Súdras*, who may, therefore, validly adopt a son without performing the *Homa* ceremony: *Behari Lal* v. *Indromani*, 21 W.R., 285, affirmed by Privy Council, *Indromoni* v. *Behari Lal*, I.L.R., 5 C., 770.

(5) Nanda Pandita was neither a lawyer nor a judge, but merely a Sanskritist and teacher of the sacred literature, and the above prohibition may be fairly taken to be intended by him as directory only, and a rule of the Law of Honour. Nor does he say that an adoption made in contravention of that prohibition is invalid, as he has done in respect of another rule, see his Dattaka-Mímánsá v, 56.

Discussion academical.—This discussion is no longer of practical importance to lawyers; since the Judicial Committee have held that as Nanda Pandita's view has been adopted and acted upon by all the High Courts for 80 or 90 years, it is incompetent to a Court of Justice to treat the question now as an open one: *Bhagwan* v. *Bhagwan*, 26 I.A., 153, 166.

Case-law.—The prohibition is not followed in the Punjab; nor in Madras where the adoption of the daughter's and the sister's sons has been declared valid by custom amongst the

Bráhmanas, I.L.R., 9 M., 44; but notwithstanding, the adoption of the son of the daughter of an agnate relative has been held invalid, I.L.R., 11 M., 49. Nor did the prohibition obtain in Bombay before 1879 A. D. when, however, the adoption by a Bráhmana, of his daughter's son was declared invalid, I.L.R., 3 B., 273. The prohibition is not respected by persons adopting in the Kritrima form in Mithilá. In the North-West Provinces the adoption by a Bohra Bráhmana, of his sister's son has been held valid according to custom, I.L.R., 14 A., 53; and in the recent Full Bench case of *Bhagwan Sing*, I.L.R., 17 A., 294, it has been held by the Chief justice Sir John Edge and the majority of the Judges of the Allahabad High Court that Nanda Pandita's rule ought not to be enforced, and that the adoption of the daughter's son and the like is valid amongst the regenerate classes. But this decision of the majority has been overruled by the Judicial Committee, as has already been noticed, according to the maxim—*Communis error facit jus.* In Bengal there is no recent reported case on the point, but there were several early decisions in conflict with each other. Here a person's daughter's and sister's son being entitled to inherit his property even when he dies joint with his co-heirs, in preference to near agnates, the question would not arise in many cases, in which the daughter's and the sister's son as such would succeed, even if their adoption be invalid,—and this accounts for the paucity of cases. In a recent case which came up to the Calcutta High Court in second appeal, but ended in a compromise, a Bráhmana had adopted his sister's son and died leaving him and a widow and also a will, and then the adopted son died during the widow's lifetime leaving sons, and thence arose the litigation between the reversioner and the sister's son's sons.

The existence of usages to the contrary, proves that there was no restriction such as is propounded by Nanda Pandita. If the works of Nanda Pandita and his followers be thrown out of consideration, there is nothing else that may suggest to a student of Hindu Law, the existence of any such restriction.

Conclusion as to prohibited relations for adoption.—It should be observed that Nanda Pandita expressly prohibits a brother, an uncle, and a daughter's, a sister's, and a mother's sister's sons, of whom the last three only are to be excluded, according to the texts of Sákala and Saunaka; and Sutherland lays down the rule that a boy whose mother is prohibited for marriage to a man by reason of relationship, cannot be adopted

by him. It is very difficult to say what is the effect of the Judicial Committee's decision in *Bhagwan Sing's* case, on this rule, since the *ratio decidendi* of their Lordship's decision in that case may be contended to be applicable even to this wide rule enunciated by the learned translator, although it is not legitimately deducible from what Nanda Pandita says on the subject. Because, right or wrong, Sutherland's rule has been reiterated by most text-writers on Hindu Law as well as by the Judges of the highest tribunals in many cases, though it appears that there is only one single case in which an adoption has been pronounced invalid by the application of this rule propounded by the learned translator : I. L. R., 11 M., 49.

But in a recent case the Bombay High Court have, on a review of all the cases bearing on this subject, come to the conclusion that the rule that—"a man cannot adopt a boy whose mother he could not have legally married"—is confined to a *daughter's* son, a *sister's* son, and the *mother's sister's* son, who are specifically mentioned in the text of Sákala : *Ram* v. *Gopal*, I.L.R., 32 B., 619.

The learned Judges appear to have rejected Sutherland's rule by refusing to accept the glosses adding to the Smritis of Sákala and Saunaka—agreeably to the observations of the Judicial Committee in the case of *Sri Balusu* v. *Sri Balusu*, namely, that although—"Their Lordships cannot concur with Knox J., in saying that their (of Dattaka-Mímánsá and Dattaka-Chandriká) authority is open to examination, explanation, criticism, adoption, or rejection like any scientific treatises on European jurisprudence,"—yet,—"So far as saying that caution is required in accepting their glosses where they *deviate from or add to* the Smritis, their Lordships are prepared to concur with the learned Judge" : 26 I.A., 113, 132.

Caste.—The adoption of a boy belonging to a caste different from that of the adopter is not forbidden by the Smritis. There is, however, a passage in the alleged work of Saunaka, already referred to, recommending adoption within the caste; and providing that an adopted son belonging to a different caste is entitled to food and raiment only and not to a share of the property, as he cannot serve the spiritual purpose. The caste exclusiveness has become so rigid now, that an adoption of a son known to belong to a different caste, is impossible at the present day.

In an unreported case from Sylhet the High Court upheld

an adoption of a Káyastha boy by a man of the Shahoo caste, by reason of there being the usage of intermarriage between these castes.

Age and initiatory ceremonies.—Neither in the Smritis nor in the commentaries on general law is there any restriction either as to the age of, or as to the performance of any initiatory ceremony upon, a person, which limits his capacity for being adopted.

But Nanda Pandita cites a passage of the Káliká-Puráṇa, a modern production called Upa-Puráṇa, laying down that a boy who has completed the fifth year, or one upon whom the tonsure has been performed though he may be within the fifth year, cannot be adopted. Nanda Pandita, however, construes the passages to mean that a boy whose age exceeds five years cannot be adopted, and that one within that age may be adopted though the tonsure has been performed upon him, but in that case the additional sacrifice of Puttreshti must be performed.

In the Dattaka-Chandriká, the passage cited from the Káliká-Puráṇa is declared spurious: but a new restriction is laid down to the effect that the age should not exceed the primary period for the ceremony of investiture with the sacred thread, which is the eighth year for Bráhmanas, the eleventh for Kshatriyas and the twelfth for Vaisyas; and that a Súdra may be adopted if unmarried.

Our courts, however, are disposed to reject these rules, but at the same time they appear to lay down the rule, namely, that a twice-born boy may be adopted if the ceremony of the investiture with the sacred thread has not actually been performed upon him; and a Súdra, before his marriage: *Ganga* v. *Lekhraj*, I.L.R., 9 A., 253.

But there is no such restriction in the Punjab, or in Mithilá as regards Kritrima adoption, or amongst the Jainas; or in Bombay where a married man with children may be adopted: *Dharma* v. *Ramkrishna*, I.L.R., 10 B., 80. Amongst the Jainas also a married man may lawfully be adopted: *Asharfi* v. *Rup*, I.L.R., 30 A., 197. It is also held in Madras that according to custom amongst the Bráhmanas the adoption of a boy of a same *gotra*, after *upa-nayana* or investiture with the sacred cord, is valid, I.L.R., 9 M., 148.

This is another innovation introduced for the first time by Nanda Pandita, uselessly fettering the freedom of action of persons in a matter which is, as it ought to be, left by the Smritis to their discretion.

But it is worthy of remark, that for the purpose of affiliation an infant of tender age, whose mind and affections are yet unformed is preferable. There should also be such a difference in the age of the boy and the adoptive parents, that the former may look like the son of the latter. But all this should be left to the discretion of the persons concerned ; no rigid rule is desirable, and accordingly the Bombay High Court has expressed an opinion that the fact that an adopted son is older than the adopting mother does not invalidate the adoption : *Gopal* v. *Vishnu*, I.L.R., 23 B., 250.

Dattaka : what ceremonies are necessary.

The ceremonies of *giving* and *taking* are absolutely necessary in all cases. These ceremonies must be accompanied by the *actual delivery* of the child ; symbolical or constructive delivery by the mere parol expression of intention on the part of the giver and the taker, without the presence of the boy is not sufficient ; *Siddessory* v. *Doorga*, 2 Indian Jurist, N. S., 22. Nor are deeds of gift and acceptance executed and registered in anticipation of the intended adoption, sufficient by themselves to constitute legal adoption, in the absence of actual gift and acceptance accompanied by actual delivery : *Nagendro* v. *S. Kishen*, 19 W.R., 133.

The formalities of giving and taking may be either what may be called ordinary and secular, or what may be designated religious and ceremonial, the latter are accompanied by the recital of Vedic texts, and therefore cannot be performed by Súdras and women ; and so in an adoption by them, the acceptance of the boy would be secular, like their acceptance of a chattel : D.M., i, 17.

In a Súdra adoption no other ceremony is necessary, giving and taking being sufficient. I have already told you that it has been held that *Homa* is not necessary for an adoption among Súdras : I.L.R., 5 C., 770 ; it used, however, to be, and still is, oftener than not, performed by them vicariously through their Bráhmana priests.

With respect to the three regenerate tribes the ceremony of *Homa* or burnt offering is said to be necessary in addition to giving and taking : see Mayne § 153, 7th edition.

The females of the regenerate classes are, like Súdras, incompetent to study the sacred literature ; so they cannot themselves recite the sacred texts and cannot consequently perform the sacrifices, although they may join their husbands

as indispensable associates in the performance of sacrifices. Hence widows like Súdras, can perform the *Homa* rite, vicariously through the sacerdotal priests. The sacred texts are omitted if women or Súdras, perform any religious ceremony : स्त्रीशूद्राणाम् अमन्त्रकं। Váchaspati Misra, however, maintains in his Vivádachintámani that widows and Súdras cannot adopt at all, by reason of their incapacity to personally perform the *Homa* ceremony.

It should, however, be remarked that the performance of the *Homa* ceremony might be dispensed with in the case of an adoption by a widow of the twice-born classes, for the same reasons as in an adoption by a Súdra. Hence if *Homa* be not necessary in an adoption by a Bráhmaní widow, the result would be that it is not necessary in any case.

It is worthy of remark that according to Hindu law a boy could be given and taken as a slave and not as a son, such a slave was called *Dattrima* or *given* ; hence, so long as slavery was in force, the *Homa* ceremony was of very great importance, conclusively proving that the boy was adopted as the *Dattrima* or *given* son, and not given and taken as a *Dattrima* or *given* slave. But now that slavery has been abolished, it is not of much value in that way.

Dattáka : his status and rights.

In Natural Family.—Except for the purpose of prohibited degrees in marriage, the connection of the adopted son with his relations by birth becomes extinguished unless they be also his relations by adoption, as in the case of the adopter and the adoptee being related before adoption. In such cases, however, the original relationship ceases, and a new relationship based on adoption, arises as far as possible between the adoptee and the original relations, through the adoptive parents.

The consanguineal Sapinda relationship in the family of his birth continues even after adoption, and in consequence an adopted son cannot marry a damsel belonging to that family, who is within the degree of Sapinda relationship.

Dvyamushyayana.—So also a boy who is adopted in the *dvyámushyáyana* form retains his natural relationship to all the original relations, and acquires, in addition, a new relationship to his adoptive parents and their relations : 13 M.I.A., 85. He is called the son of two fathers, as he is not absolutely given away in adoption, but is made a son common to both his original as well as his adoptive parents, just as a property may be transferred so

as to become the joint property of the transferrer and the transferee. A son could be of this description either by operation of law, or by express agreement at the time of adoption, and not by reason of the performance by the natural parents of any initiatory ceremonies for the boy : such a son of two fathers is called *Nitya-Dvyámushyáyana* : *Behari* v. *Shib*, I.L.R., 26 A., 472. According to some, an only son can be adopted only in this form ; for, as a matter of law, he must continue his progenitor's son notwithstanding adoption in the ordinary mode. An express adoption in this form is now rare. If an only son of one brother be adopted by another brother or his widow, he becomes, by operation of law, the son of two fathers, an express stipulation being unnecessary : *Krishna* v. *Puramshri*, I.L.R., 25 B., 537.

The natural mother of a *nitya-dvyámushyáyana* son is entitled to inherit from him ; I.L.R., 26 A., 472.

Absolute adoption is civil death and new birth.—An absolute adoption appears to operate as birth of the boy in the family of adoption, and as civil death in the family of birth, having regard to the legal consequences that are incidents of such adoption. He is deemed to be begotten by the adoptive father on his own wife who is the adoptive mother. His status as son of his real parents ceases in the same way as if he were dead at the time of adoption. He cannot be born again without having been dead. Manu's text Nos. 11 and 12 (*Supra* pp. 121 & 122) as explained in the Dattaka-mímánsá and the Dattaka-chandriká, and by other Sanskrit commentators, are clear authority for the proposition that adoption is tantamount to civil death and fresh birth.

The boy cannot take away with him the natural father's *gotra* and *riktha*, when he is passing from the family of his birth to that of adoption, or more properly speaking, when he becomes divested by adoption, of the status of being the son of his progenitor, and is invested with the status of being the son of the adopter. His status of sonship to the real parents being extinguished, he ceases to be a member of the natural father's *gotra* or family, and his existing proprietary right in the progenitor's property also comes to an end, as well as his capacity to perform the exequial rites for the spiritual benefit of his natural father and other ancestors ceases ; both secular and spiritual connection with the natural parents and their relations, cease for ever. At the same time the very same connection, arises with the adoptive parents

and their relations ; he acquires the status of sonship to the adoptive parents, and as such becomes a member of the adopter's *gotra*, becomes a coparcener of his family estate, and is invested with the capacity for offering *pinda* to him and his ancestors.

According to ancient Hindu law the status of a person appears to have been determined by three things, namely, the *gotra*, the *riktha*, and the *pinda*. The Joint family system was and still is the distinctive feature of Hindu society, the family and not the individual was the unit of society, and each family was possessed of the *riktha* or property forming the hereditary source of maintenance of its members ; and it was an imperative duty of a person to provide with *pinda* or funeral oblations, the deceased ancestors of the family to which he belonged. The members of a family appear to have been divided into two classes, some were co-proprietors of the *riktha* or family estate, while the rest were not so, but entitled to maintenance only, out of the said estate.

The two passages of Manu, one (ix, 142) dealing with the extinction of the adopted son's status in the family of birth, and the other (ix, 158-160) with the accrual of the new status in the family of adoption, are illustrative, and are based on the principle and fiction of civil death and fresh birth. Accordingly the same legal consequences follow from adoption, as from retirement, or adoption of a religious order. The adopted son is to be deemed dead in the family of birth, and succession must therefore open to any property that may belong to him at the time of adoption, of which he becomes divested.

The law on the subject has been misunderstood, owing to the mis-translation of Manu's text, ch. ix, sloka 142 (text No. 11) which clearly implies that the adopted son's existing proprietary right in the natural father's property becomes extinguished ; otherwise, why should he not take away with him such property or his share in the same when he is leaving the progenitor's family for joining the adopter's family ? And the text has been so understood by all the Sanskrit commentators. The view expressed in the Tagore Law Lectures on adoption, that there is no authority for maintaining adoption to be tantamount to civil death,—is erroneous as being contrary to the said text of Manu, and to the commentaries on Hindu law, which do not appear to have been taken into consideration in the said Lectures ; although the same view has also been

taken in the case of *Behari* v. *Kailas*, 1 W. N., 121, in consequence of the proper materials for a correct decision not being placed before the learned judge.

Manu's text (No. 11 *Supra* p. 121) is cited and explained in both the Treatises on Adoption: (गोत्र-रिक्थे जनयितु र्न हरेत दत्तिम: सुत: । गोत्र-रिक्थानुग: पिण्ड:, व्यपैति ददत: स्वधा ॥) its correct translation is as follows, —"The *Gotra* (= sonship) and the *Riktha* (= wealth) of the progenitor, the Dattrima (= Dattaka) son is not to take away: the *Pinda* (= oblation offered to deceased ancestors) is follower of the *Gotra* and the *Riktha* ; (therefore) the *Swadhá* (= *Pinda*) goes away absolutely from the *Giver* (of the son in adoption)."

The author of the Dattaka-Mímánsá (vi, 6-9) cites this text of Manu, and introduces it by saying,—"Manu declares also another rule," and explains the text thus,—

"The *given* son is not to partake of the progenitor's *gotra* and *riktha*; likewise of him who gives the son, the *swadhá*, *i. e.*, *srádddha* performed by the *given* son goes away absolutely (*i. e.*, ceases). The author of the (Smriti-) Chandriká (says)—'By this (text of Manu) is declared that by the very act creating filial relation (to the adopter), the given son's proprietary right in the adopter's property and the status of being of the same *gotra* with him, arise ; and on the other hand, through the extinction of the filial relation (to the *giver*) from the very act of *giving* (in adoption), the extinction of the *given* son's proprietary right in the *giver's* property, and the extinction of the *giver's gotra*,—take place.'"

The author of the Dattaka-Chandriká also cites this text of Manu, (ii, 18-19) and offers the following comment on it,— "By this (text) it is declared that through the extinction of the filial relation (to the *giver*), from the very act of giving (in adoption), the extinction of the *given* son's proprietary right in the giver's property, and the extinction of the *giver's gotra*, —take place."

The commentators of Manu's Code and other commentators put the same meaning on this text of Manu, indicating that the *given* son's existing rights become extinguished by adoption. It should also be borne in mind that what is predicated with respect to the progenitor applies to all relations in the family of birth.

The principle which underlies what is understood to be the meaning of this text of Manu appears to be that adoption operates as civil death as if the adopted person as son of his natural parents, becomes dead, and at the same time operates

as new birth, as if he becomes again born as son of the adoptive parents. This principle is perfectly consistent with the principles of equity, justice and good conscience, and accordingly it has been adopted and acted upon by Justice Mukhopádhyáya an eminent judge distinguished for his scholarship and learning: *Birbhadra* v. *Kalpataru*, 1 L. J., 388.

Adopted son cannot renounce status by adoption.—The boy who is validly given away in adoption by his parents, has no choice in the matter : he cannot renounce the status as adopted son ; he cannot question the power of his parents to cause the severance of his connection with his natural relations; he may give up his right of inheritance from the adopter, but he cannot give up his status as adopted son, and return to his family of birth : *Mahadu* v. *Bayaji*, 1.L.R., 19 B., 239.

Status and inheritance in the adoptive family.—The adopted son's status and rights in the family of adoption, are dealt with by the commentators, as being based upon express texts, and according to them the adopted son stands in many respects on a footing very different from that of the real legitimate son. As regards inheritance, there is a conflict between the Smritis, some of which are very favourable to the adopted son while others are not so, the latter admitting his right of inheriting from the adoptive father alone. The commentators endeavour to reconcile the conflicting texts by holding that possession of good qualities will entitle the adopted son to inherit from the adoptive father as well as from his relations ; otherwise, he will inherit from the adoptive father alone. There is, however, no express authority in Hindu law recognizing the adopted son's right of inheritance from the adoptive mother's relations.

Our Courts of Justice have avoided the difficulty by laying down a rule based upon the principle of equity and justice, and so cutting the Gordian knot of conflicting texts,—the principle being that the adopted son should have the same rights in the family of his adoption, as he loses in the family of his birth, unless there be express texts curtailing the same : they have thus adopted a principle which appears to be quite contrary to that followed by the commentators, namely, that the adopted son cannot claim any right unless there be an express text giving him that right,—and have disregarded the above distinction drawn by the commentators, by tacitly assuming the adopted son to be endowed with good qualities in every case.

Accordingly it is now settled by the decisions of the superior Courts that, as regards inheritance the adopted son holds in all respects the same position as an *aurasa* son of the adoptive father and the adoptive mother, and is entitled to all the rights of a real son of the adoptive parents with the exception of only such as has been *expressly* denied him.

The result is, that he will inherit from the adoptive father, the adoptive mother (*Teencowri* v. *Denonath*, 3 W. R., 49) and all their relations without any distinction or restriction, subject only to one exception mentioned below: the adopted son of a full brother will take in preference to the *aurasa* son of a half-brother; and one daughter's adopted son will inherit equally with another daughter's real son: *Padmakumari* v. *Court of Wards*, I.L.R., 8 C., 302; *Kalikomal* v. *Umasunker*, I.L.R., 10 C., 232; see also *Mokundo* v. *Bykunt*, I.L.R., 6 C., 289; *Sham* v. *Gaya* I.L.R., 1 A., 255; *Sumbhoo* v. *Narain*, 3 Knapp, 55 = 5 W.R., P.C., 100.

Theory of adoption.—It has already been observed that the theory of adoption is complete affiliation, and consists one, then the question may arise as to which of them will be in the fiction of new birth, the adopted boy being deemed to be begotten by the adoptive father on his own wife. But it must not be supposed that the inequality of the *aurasa* and the *dattaka* sons as regards their rights, such as is found in the commentaries, is inconsistent with this theory. For even among *aurasa* sons unequal distribution of property at partition, is laid down in the Smritis, and used to be made in former times.

Adoptive mother.—When the adopter has more wives than one, then the question may arise as to which of them will be the mother of the adopted son. If the adopter allows any one of his wives to join him in the ceremony of taking the boy in adoption, in that case she will be his adoptive mother, and her co-wives his stepmothers, so that the adopting mother would succeed to him to the exclusion of the other wives of the adoptive father. See W. R., Gap. No., p. 71 and I.L.R., 18 M., 277. On appeal against this Madras case, the Judicial Committee held these two cases to be rightly decided. In this case a man selected one of his two wives to adopt a boy in conjunction with him, the boy inherited the adopter's estate and died an infant, leaving the two widows of the adopter; the adopting widow was held entitled to succeed to the estate in preference to the other: *Annapurni* v. *Forbes*, 26 I.A., 246.

But a difficulty arises if the adopter alone takes the boy, or when all his wives join with him, if the latter course be possible. In either case all the wives might be taken to be his adoptive mothers. But fiction would then surpass nature: joint production of a single son by several females is a phenomenon unheard of, except in the story of Jarásandha in our Mahábhárata. The Itihásas and the Puránas, however, are our books of precedents, and you may rely upon them for drawing an argument by analogy in favour of the adopted son's rights. So the adopted son who is a favourite of law would have different sets of maternal relations to inherit from, if such an anomaly be permissible.

A greater difficulty presents itself when a widower or a bachelor adopts. In the first case it might be said that the deceased wife of the adopter will be the adoptive mother, and her relations the maternal relations of the adopted son. The difficulty in the latter case, however, must remain unsolved.

But it should be observed that although the husband's son is deemed by courtesy to be the wife's son, yet acceptance by the wife is absolutely necessary to constitute the husband's adoptee, her legal son. Even when a man has only one wife, and the man alone adopts, and the wife does not join in the act of adoption or concur in it, the legal relation of mother and son cannot arise between them. Nanda Pandita, no doubt, maintains that although the husband's assent is necessary for an adoption by the wife, yet the husband may adopt without the assent of the wife, and the son so adopted would belong to the wife, in the same manner as any property given to, and accepted by him. But as the wife's co-ownership in the husband's property, although it amounts to a legal interest therein, is neither co-equal nor similar to that of the husband, but is subordinate in quality and character, and is acknowledged to entitle her to use and enjoy the same, as wives usually do; similarly, there can be no actual and legal relation of mother and son between the wife taking no part in the adoption, and the husband's adopted son, any more than between a wife and the husband's begotten son by her co-wife. That a stranger adopted by a man without the concurrence, or even against the will, of his wife, would become legally her son, is a proposition which must be established by authority; should there be none, the above *ipse dixit* of Nanda Pandita declaring the husband's independence of the wife as regards adoption, would not be sufficient for that purpose. It would

be begging the question to say that the husband's adopted son becomes the son of his wife, when he has only one wife, even without her consent, Nanda Pandita also, appears to indicate that acceptance by the wife is necessary to constitute her the legal mother of her husband's adopted son, by saying that the ancestors of the *mother that accepts* in adoption —प्रतिपद्यिनी या माता—are the adoptee's maternal grandsires in the ceremony of Párvana Sráddha performed by him: Dattaka-mímánsá, vi, 50. Hence the term, 'adoptive mother' must be taken in its primary meaning of *adopting* mother, and not in the figurative sense of the adopter's wife. The Sanskrit rule of legal construction is that every word should be taken in its ordinary primary meaning न विधौ परः शब्दः। The incidents of Kritrima adoption in *Mithilá*, throw considerable light on the point.

Ante-adoption agreement curtailing adopted son's rights.—It has already been noticed that a widow is not legally bound to execute the power of adoption, however solemnly she might be enjoined by the husband. Her interest in the husband's estate is not affected by her omission to adopt. Her interest is opposed to her duty to carry out the husband's wishes; these are sought to be reconciled by an agreement before adoption, between the widow and the natural father of the boy, whereby the widow retains some interest in the husband's estate for her life. Such arrangement does not appear to be open to any valid objection, if the right retained does not exceed the widow's estate which she is entitled to enjoy notwithstanding an authority to adopt, which she may ignore. It cannot be deemed to be a fraudulent execution of the power. When the donee of the power derives a benefit from the execution of the power in a particular manner, but for which he could not have got the benefit, then and then only the execution may be regarded a fraud upon the power. But the power of adoption is a peculiar one, the like of which is not found in the English law. The Bombay High Court has held that an agreement by the natural father consenting to the retention by the adopting widow, of certain interest in the husband's estate is binding on the adopted son: *Ravji* v. *Lakshmi*, I.L.R., 11 B., 381, 398. The Judicial Committee have expressed an opinion against such agreement, in a case in which it was made *after* adoption. Their Lordships observed,—"No conditions were attached to the adoption. Had it been otherwise, the analogy, such as it is, presented by the doctrine of Courts of Equity in this country relating to the execution of powers

of appointment would rather suggest that, even in that case, the adoption would have been valid and the conditions void."—16 I.A., 59=I.L.R., 16 C., 556.

Relying on this *obiter dictum* of the Privy Council the Madras High Court held that the adopted son's rights cannot be curtailed by any ante-adoption agreement of the natural father: *Jagannadha* v. *Papamma*, I.L.R., 16 M., 400. But the attention of the court appears to have not been drawn to the decision of the Privy Council in the case of *Ramasami* v. *Venkatarama*, (6 I. A., 197, 208 = I.L.R., 2 M., 91, 101), in which their Lordships observed that the question how far the natural father can by agreement before adoption renounce his son's rights is not unattended with difficulty; and then after referring to the Bombay case of *Chitko* v. *Janaki*, (11 B. H. C., 199) in which such agreement was declared valid and binding,—went on to say,—"In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was *not void*, but was, at the least, capable of ratification when his son became of age."

The effect of such a view as the one taken in the above Madras case would be, that adoption will not take place at all in most cases, that is to say, a greater fraud will be perpetrated on the power, which the courts are powerless to prevent. It is doubtful whether this result is desirable, and our courts should consider whether it is not preferable that the lesser fraud, if fraud it be, should be permitted. Besides it would be no less a fraud on the Purdanashin widow who is induced to adopt upon the understanding, that the conditions subject to which she adopts are valid and binding on the adopted son, if the conditions be declared void and the adoption good.

In the recent case of *Visalakshi* v. *Sivaramien*, I.L.R., 27 M., 577,—in which an adoption was made by a widow in consequence of the consent of the natural father to the terms of a registered deed executed by her in favour of the adopted son before adoption, whereby it was provided that in case of disagreement between the adopted son and the widow, she should enjoy for her life about a moiety of the husband's estate, which would devolve after her death on the adopted son, —a Full Bench of the Madras High Court have held that the provision in favour of the widow is binding on the adopted son. The previous ruling in the above Madras case is over-ruled by the Full Bench, the view taken therein being such that cannot be maintained as just and equitable. The real test in

such cases is, whether the arrangement is fair and reasonable, and is such as is necessary for safe-guarding the interest of the Purdanashin ladies who are entitled to the protection of the Courts in the same manner as the infants that are adopted.

Adopted son's share.—The only exception, agreeably to the principle (p. 166) mentioned above, is, as to the amount of share to be obtained by the adopted son when a real son becomes subsequently born to the adoptive father, there being express texts giving to the adopted son, a lesser share in that event. In this respect too, there are conflicting texts, some giving him a third share, some a fourth share, while there is a text of Vriddha-Gautama, cited in the Dattaka-mímánsá, v, 43, which says that an adopted son endowed with excellent qualities and an after-born son are equal sharers.

In dealing with the adopted son's heritable right, our Courts have assumed him to be endowed with excellent qualities in all cases; if the same assumption be made with respect to the question as to the amount of his share, when an *aurasa* son is subsequently born, then he should get an equal share in all cases, according to the above text of Vriddha-Gautama. But the question has not been considered from this point of view, in the cases on the subject.

Vasishtha (Text No. 2, p. 118 *ante*) lays down that if an *aurasa* son be born after adoption, then the Dattaka son gets a fourth share. But Devala (cited in the Dáyabhága, Ch. x, para 7) says that he partakes of a third share.

The expressions one-third share and one-fourth share appear to be used in the texts, as having reference to the share of the *aurasa* son; and not as being so much part of the estate, for if that had been the case, then if many real sons be born, the adopted son would have got a larger share than each of them. The conflict has not been reconciled, nor are the terms satisfactorily explained. But the rule adopted is, that in Bengal the adopted son would get half of what a begotten son gets (I.L.R., 4 C., 425); and in other places, one-third of the same (1 Mad. H.C.R., 45; I.L.R., 16 B., 347). But it has recently been held by the Bombay High Court that he is entitled to a fifth share instead of a fourth share, (*Giriapa* v. *Ningapa*, I.L.R., 17 B., 100), in other words, to one-fourth of what a legitimate son gets. And in a still more recent case the Calcutta High Court also have taken the same view: *Bir* v. *Kalpa*, 1 L.J., 388.

But the quarter share to which a maiden sister is entitled on partition made by her brothers of the joint family property

is thus explained in the Mitákshará, (Ch. 1, sect. vii, paras. 5-7,)—at first allot to each of the maiden sisters a share equal to that of a brother and a wife of the father, if any, and then assign one-fourth of such a share to each of the maiden sisters, and then distribute the residue equally among the brothers and the mother and step-mother if any.

If the Dattaka son's one-third or one-fourth share be explained in this way, then he is to get $\frac{1}{6}$ or $\frac{1}{8}$, if only one son be born after adoption,—and $\frac{1}{9}$ or $\frac{1}{12}$ if two sons be born.

There is no other express authority in the Smritis for curtailing the rights of the adopted son. But the author of the Dattaka-chandriká extends this rule of difference in shares, to cases of partition between male descendants in the male line down to the great-grandson, where there is competition between an adopted and a real descendant. He does so by analogy which would make the rule applicable to all cases in which there is competition between a real and an adopted relation.

The extended rule has been followed by the Calcutta High Court in a case in which the adopted son of one brother brought a suit for partition against the sons of two other brothers (*Raghub* v. *Sadhu*, I.L.R., 4 C., 425); they formed members of a joint family governed by the Mitákshará. The Madras High Court doubts the correctness of this decision: (*Raja* v. *Subbaraya*, I.L.R., 7 M., 253).

The rule was not applied to a case in which the adopted son of one daughter was a claimant together with the real legitimate son of another daughter, both of whom were held to be equal sharers (*Surjo* v. *Mohes*, I.L.R., 9 C., 70).

Another novel rule enunciated for the first time by the Dattaka-chandriká, is, that a Súdra's adopted son should share *equally* with his begotten son, on the ground that a Súdra's illegitimate son may by the father's choice get an equal share with his legitimate sons. It is difficult to understand the cogency of this argument. This rule, however, has been followed by the Madras High Court (I.L.R., 7 M., 253), for this book is said to be of special authority in Bengal and Madras.

Adopted son's right as against adopter.—The position of an adopted son is secure under the Mitákshará: for as he is entitled to all the rights of a real legitimate son, he acquires from the moment of adoption, a right to the ancestral property, so as to become the co-owner of the adoptive father with co-equal rights. But if his position be not better than that

of a real legitimate son, then under the Dáyabhága, and also under the Mitákshará so far as regards the self-acquired property, the adopted son would be left completely at the mercy of the adoptive father. The proposition that an adopted son is entitled to the same rights as a real legitimate son of the adoptive parents, confers on him in Bengal the contingent and uncertain right of inheriting from them and all their relations. But the certain right of inheriting the adopter's property ought to be secured to him by curtailing the adopter's power of giving away his property to the detriment of the adopted son, seeing that the moving consideration inducing the parents to give their son in adoption is, his advancement by his appointment as heir to the adopter's property. According to the principle of equity and justice, therefore, our Courts are competent to protect an adopted son against the capricious and whimsical disposition of his property by the adoptive father, made with a view to deprive the son, of the right of inheriting the same, when the protection afforded by natural love and affection to real legitimate sons is wanting in his case. There are, however, some cases governed by the Mitákshará, in which it has been held that an adoptive father is competent to make a gift of his self-acquired immoveable property either by an act *inter vivos* (*Rungama* v. *Atchama*, 4 M.I.A., 1=7 W.R., P.C., 57) or by a will (*Purushotam* v. *Vásudev*, 8 Bom., H.C.R., O.C., 196; *Sudanund* v. *Bonamalee*, Marshall, 137=2 Hay, 205), so as to deprive the adopted son. But in these cases, the principle of equity could not be invoked, inasmuch as the adopted sons became entitled to large ancestral estates.

In Hindu law adoptions took the place of Wills which were unknown and unrecognized. Adoption is regarded by the Hindus as an appointment of the heir and successor to the adopter. The moving consideration influencing the natural parents to give away their son in adoption is the belief that it is an advancement of the child who is sure to get the rich inheritance of the adoptive father. They would not have parted with their son, if they had believed that the adopter could disinherit him, according to his pleasure: had they thought such disinherison possible they would have required the adopter to settle his property on the boy before making the gift. But this course has now become absolutely necessary, inasmuch as the Privy Council have held that in adoption there is no implied contract with the natural father

that in consideration of the gift of his son, the adopter will not make a will, depriving the adopted son of his estate: (*Sri Raja* v. *Court*, 26 I.A., 83=3 W.N., 415). It is so held even in a case where there was an express agreement in which it was said that the adopter constituted the boy his heir to his estate; their Lordships remarked that by saying that the adopter meant only that he had given him the same right of inheritance as a natural son would have. But it should be observed that that is a right which the law gives to an adopted son, no contract was necessary for securing it to him in that case.

Adoption by widow and divesting.—When a person dies giving an authority to his widow to adopt a son unto him, then his estate must vest in the nearest heir living at the time of his death; for a Hindu's estate cannot remain in abeyance for a nearer heir who may come into existence in future. Hence if he dies without leaving male issue, his estate must vest either in his widow or widows, or in the surviving collateral male members of the joint family if governed by the Mitákshará. If again the person leaves behind him a son and authorizes his widow to adopt in the event of that son's death without male issue, his estate vests in that son, and on the latter's death may vest in a person other than the widow authorized to adopt. Between the death of the adoptive father and the adoption, succession, might open to the estate of deceased relations of the adoptive parents, which would have devolved on the adopted son, had his adoption taken place before the falling in of the inheritance. Hence arises the vexed question as to what estates, already vested in other persons, may a subsequently adopted son take by divesting them, the ordinary rule of Hindu law being that an estate once vested by inheritance cannot be divested by reason of any subsequent disqualification of the heir: (*Moniram* v. *Keri*, I.L.R., 5 C., 776), or by reason of a nearer heir coming into existence afterwards: (*Kalidas* v. *Krishna*, 11 W.R., O.C., 11=2 B.L.R., F.B., 103). Hence divesting by adoption is an exceptional rule founded on the peculiar character of the institution, and entirely based upon judicial decisions which do not seem to be quite consistent.

When the estate is vested in the adopting widow as heiress of her deceased husband, she becomes divested by the adoption which is an act of her own choice. If the husband's estate is vested in two co-widows, and one of them

adopts a son in the exercise of the power granted by the husband, it has been held that both the widows become divested: *Mondakini* v. *Adinath*, I.L.R., 18 C., 69. So in Bombay it has been held that when the senior widow without authority from the husband adopts a son of her own accord, the junior widow is also divested of her interest in the husband's estate (5 Bom., H.C.R., A.C.J., 181 ; 8 *idem*, 114). But in a case where a person died leaving two widows and a son by the senior widow, and giving authority to the junior widow to adopt in the event of that son's death, and on the happening of that event the junior widow adopted a son, it has been held that the senior widow cannot be divested of the estate which became vested in her as the mother and heiress of the son: *Faiz-uddin* v. *Tincowri*, I.L.R., 22 C., 565. So also when on the existing son's death the estate vested in his widow or in his paternal grandmother or other heir, it has been held that his mother in the former case, and his stepmother in the latter, could not adopt, and cause the estate to be divested: *Bhoobunmoyee* v. *Ramkisore*, 10 M.I.A., 279 = 3 W.R., P.C., 15 ; *Dromomoyee* v. *Shama*, I.L.R., 12 C., 246 ; *Annammah* v. *Mabbu*, 8 Mad., H.C.R., 108 ; *Anandi* v. *Kashi*, I.L.R., 28 B., 461.

But if the estate vests in the adopting widow by inheritance from her son or son's son, and she then adopts, the adoption will be valid, and the widow will be divested of the estate, according to the Mitákshará school: *Jamnabai* v. *Raychand*, I.L.R., 7 B., 225 ; *Ravji* v. *Lakshmibai*, I.L.R., 11 B., 381 ; *Lakshmi* v. *Gatto*, I.L.R., 8 A., 319 ; *Manikchand* v. *Jugutsettani*, I.L.R., 17 C., 518. The law may be contended to be different in the Bengal school, as regards divesting in such cases, because here under no circumstances can a brother take in preference to the mother, or a paternal uncle in preference to the paternal grandmother ; whereas according to the Mitákshará the male members of a joint family take, to the exclusion of the females, the undivided coparcenary interest of a deceased member; and the adoption may be assumed to relate back to the time when the estate vested in the adopting widow. Opposite opinions have been expressed by the learned Judges of the Calcutta High Court, the preponderance is in favour of the view that the mother becomes divested: see *Padma* v. *The Court*, I.L.R., 5 C., 615 ; 2 W. N., 389 = I.L.R., 25 C., 662 and *Rai Jatindra* v. *Amrita* 5 W. N., 20. The principle upon which is based, the opinion expressed by the Judicial Committee in the cases of *Bhoobunmoyee*

(10 M.I.A., 279) and *Vellanki* (I.L.R., 1 M., 174), namely, that the widow becomes divested of the estate even when inherited by her from a deceased son,—appears to be, that the power of adoption is a kind of power of appointment, (*Bai Moti* v. *Bai Mamu*, I.L.R., 21 B., 709), and accordingly the adoption of a son by the widow operates as the execution of the power and the appointment of the property to the adopted son, and so the widow becomes divested by the operation of law, of the property, from whomsoever inherited.

An adoption by the widow of a predeceased son without the assent of her mother-in-law cannot divest the latter of the father-in-law's estate vested in her : *Gopal* v. *Vishnu*, I.L.R., 23 B., 250.

When a member of a joint family governed by the Mitákshará dies giving permission to his widow to adopt a son, then his undivided co-parcenary interest vests, on his death, in the surviving male members, who however, will be divested by the subsequent adoption made by the widow : *Bachoo* v. *Mankonebai*, 34 I.A., 107 ; *Sri Virada* v. *Sri Brozo*, I.L.R., 1 M., 69=3 I.A , 154 ; *Surendra* v. *Sailaja*, I.L.R., 18 C., 385. It should be observed, however, that vesting and divesting go on continually by births and deaths in a Mitákshará joint family, and the law in this respect, is somewhat different in the two schools. But it appears that if the male member in whom the undivided interest of another member authorizing his widow to adopt, vests by survivorship, dies and the whole family property vests in his widow, and then the other widow adopts, such adoption would be invalid by reason of the second widow being not divested : *Rupchund* v. *Rukhmabai* 8 Bom., H.C.R., A.C.J., 114. The distinction is that if the adoption is made when the undivided co-parcenary interest of the adoptive father remains vested in his co-parcener taking by survivorship the interest is divested and the adoption is valid ; but if the adoption is made after the estate has passed from the co-parcener taking by survivorship to his heir then the estate cannot be divested and the adoption is invalid : *Chandra* v. *Gojarabai*, I.L.R., 14 B., 463.

An adoption made with the assent of the person in whom the estate is vested will divest him of that estate : *Payapa* v. *Appanna*, I.L.R., 23 B., 327.

As regards the estate of any other than the adoptive father, succession to which had opened before adoption, the adopted son cannot lay any claim to the same (*Kally* v *Gocool*,

I.L.R., 2 C., 295), even when the adoption was delayed by the fraud of the person in whom the succession vested : *Bhubaneswari* v. *Nilkamal*, I.L.R., 12 C., 18 affirming I.L.R., 7 C., 178.

Unauthorized alienation by widow.—As an adopted son becomes entitled to the adoptive father's estate by divesting the widow, he acquires from the time of adoption the right to recover any property that has been alienated by the widow without legal necessity. He is not to wait until the widow's death, like the reversioner ; for, the widow's estate comes to an end immediately on adoption, consequently no unauthorised alienation by her, can subsist beyond the extinction of her own title which alone could pass to her transferee : *Bonomali* v. *Jagat*, 1 L. J., 319 ; *Moro* v. *Balaji*, I.L.R., 19 B., 809.

A contrary view, however, has been taken in some cases in which the unauthorized alienation by the widow before adoption is held valid for her life, upon the hypothesis that she had power to transfer her life-interest : *Sreeramulu* v. *Kristama*, I.L.R., 26 M., 143. Some learned Judges of the Calcutta High Court thought that in *Bhoobunmoyee's* case (10 M. I. A., 279) the adoption was not intended to be declared invalid, but all that the Privy Council intended to lay down, was, that the adopted son, as brother to the last full owner of the estate, could not succeed during the life-time of his widow and mother, (I.L.R., 5 C., 615, 644), and accordingly their Lordships held that the adopted son could not get possession of any property alienated by the widow, during her life : 24 W. R., 183 ; I.L.R., 2 C., 295, 307 ; I.L.R., 4 C., 523.

It is difficult to understand how the widow could be held to have a life-interest in the estate inherited by her. If that were so, how is she divested by adoption. If the exercise of the power of adoption operates as the appointment of the estate to the adopted son, the legal effect of which is to cause the estate to vest in the son by divesting the widow, then the widow's transferee also must necessarily be divested ; he cannot be in a higher position than the widow herself. It is impossible to find out any principle for drawing a distinction between the widow and the transferee from her, with respect to divestment. There is no reason why the widow's estate should be deemed liable to determination by her death or remarriage only, and not also by adoption under the husband's power. The adopted son's rights should be the same as those of a posthumous son. A purchaser from a widow who is authorized to adopt, cannot invoke any principle of equity for preventing

the immediate resumption by the adopted son, of what has been alienated without legal necessity. The adopted son's cause of action is held by the Privy Council to arise from the date of adoption, to recover possession from the widow's transferee: *Rai* v. *Jagat*, 32 I.A., 80=1 L.J., 319.

Effect of invalid adoption.—There are two elements in an adoption, *first*, the transfer of the *patria potestas* or paternal dominion over the boy from the natural father to the adopter, causing the extinction of his status in the family of birth, *second*, the investment of the boy with the status of son unto the adopter. When slavery was recognised, if the adoption was invalid, the boy would not acquire the status of sonship to the adopter, but the effect of *gift* by the father or the mother and *acceptance* of the boy, would be the loss of his status in the family of birth, and the acquisition of the condition of a slave of the adopter, and as such he was entitled to maintenance only in the family of adoption. But such an effect as this cannot arise now that slavery has been abolished: if the adoption fails, the boy's status in the family of his birth will remain unaffected by the invalid adoption. This distinction is not borne in mind. There are some decisions in which the former view was taken, which was correct before the abolition of slavery; while there are others in which the latter view has been expressed.

Suit to set aside an invalid adoption.—The presumptive reversioner or more properly the next heir and when he refuses or is in collusion or is a female the remoter reversioner is permitted to bring a suit for a decree declaring the invalidity of an adoption during the life of the adopting widow. Considering the grave and important nature of disputes relating to the truth or validity of an adoption involving questions of family status and the serious consequences of a decree declaring the invalidity of an adoption on the rights of the boy adopted, it appears to be desirable that such suits should be permitted to be brought within a short time from the time of adoption, and that the adjudication made in them should be made final as far as possible. But with respect to suits relating to alienations made by a female heir it has been held in a series of cases that the presumptive reversioner cannot represent the remote reversioners. And although suits to set aside adoptions are analogous to suits relating to alienations, still they stand on a different footing. Accordingly, a Full Bench of the Madras High Court have in an elaborate judgment held that on

principle the presumptive reversioner or a more remote reversioner when permitted to bring such suit, ought to be held to represent all reversioners provided the plaintiff disclose the names of all persons interested in the reversion and serve notices on them to enable them to be made parties should they so desire, and provided the matter is decided after a fair trial: the true object of the concession of this right of suit, is, the protection of the interest of the actual reversioner, and the perpetuation of testimony which might be lost by the time the succession actually opens: *Chiruvolu* v. *Chiruvolu*, I.L.R., 29 M., 390.

The grounds on which such suits are brought are the absence or illegality of the power of adoption given to the widow, the ineligibility of the boy by reason of his being within prohibited degrees for adoption, or other defects, and the non-performance of the necessary ceremonies. The payment by the adopter of any consideration to the boy's natural father for inducing him to make the gift in adoption, has in some cases been contended to constitute the boy as *krita* or *purchased* son, and not Dattaka son, and so to render the adoption invalid. But the Madras High Court have held that the receipt of money by the natural father in consideration of giving his son, though unlawful, does not vitiate the adoption consisting of the gift and acceptance of the boy—which is a distinct and separate transaction: *Murugappa* v. *Nagappa*, I.L.R., 29 M., 161. But see 21 W. R., 381, *contra*.

Limitation for declaring invalidity of adoption.—The view that if an adoption is invalid, the adopted son's natural rights remain quite unaffected, is just and equitable. There is, however, great practical difficulty in giving effect to it, when the adoption is set aside after a considerable time has elapsed from adoption, and most of his natural rights have become barred by limitation.

While construing the provisions of the Limitation Act of 1871, on this point, the Judicial Committee observed,—"It seems to their Lordships that the more rational and probable principle to ascribe to an act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoption shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession": *Jagadamba* v. *Dakhina*, 13 I.A., 84 = I.L.R., 13 C., 308.

But nevertheless, all the High Courts did at one time hold that under the present Limitation Act the reversionary heir is entitled to twelve years after the death of the widow who inherited her husband's estate and adopted a son unto him, for instituting a suit to obtain possession of the estate on declaration of the invalidity of the adoption, and that the Article 118 applies to suits for declaratory decrees only: see I.L.R., 25 C., 354; I.L.R., 27 C., 242 and the cases cited therein. But recently, having regard to the principle enunciated by the Judicial Committee in *Jagadamba's* case, and to an observation made by their Lordships in *Mohesnarain's* case (20 I.A., 30 = I.L.R., 20 C., 487), and also to the decision in *Luchman Lal's* case (23 I.A., 51 = I.L.R., 22 C., 609) the Madras High Court, and a Full Bench of the Bombay High Court presided by Sir Lawrence Jenkins, have held that the Article 118 of the present Limitation Act governs a suit for a declaration that an adoption was invalid, whether the question as to its validity is raised by the plaintiff in the first instance, or arises in consequence of the defence setting up the adoption as a bar to the plaintiff's claim to the adoptive father's estate: *Parvathi* v. *Saminatha*, I.L.R., 20 M., 40, and *Shrinivasa* v. *Hanmant*, I.L.R., 24 B., 260; *Lakmana* v. *Ramappa*, 32 B., 7.

This view is supported by the opinion expressed by the Privy Council in the subsequent case of *Malkarjun* v. *Narhari* (27 I.A., 216 = I.L.R., 25 B., 337), in which their Lordships held by applying the principle set forth in *Jagadamba's* case that one year's limitation prescribed by Article 12 (*a*) of the Act of 1877, is not confined to only suits in which no other relief than a declaration setting aside a sale, is sought, but applies also to suits where other relief is sought which can only be granted by setting aside the sale. This principle is applicable *mutatis mutandis* to Articles 118 and 119 of the present Limitation Act XV of 1877.

But in the recent case of *Thakur Tirbhuwan* (33 I.A., 156) the Judicial Committee appear to have expressed a contrary opinion which is no doubt an *obiter dictum*.

The Allahabad High Court, however, adheres to the old view: I.L.R., 24 A., 195; 26 A., 40. The Calcutta High Court appear to be divided in opinion; see I.L.R., 30 C., 990, 996; 9 W.N., 222; see also I.L.R., 26 M., 291.

Invalid adoption and *Persona designata*.—When a gift is made by a Deed or a Will to a boy who has been adopted, or whose adoption is directed, by the donor, but who is not adopted or whose adoption is held invalid, then a question

arises with respect to the validity of the gift. If the intention is clear to benefit the boy who is identified irrespective of adoption, the reference to which is intended as mere description, then the gift must be held good according to the same principle as is laid down in Section 63 of the Succession Act: *Nidhoo* v. *Sarada*, 3 I.A., 253=26 W.R., 91; *Bir* v. *Ardha*, 19 I.A., 101=I.L.R., 19 C., 452. But, if on the other hand, the adoption of the boy appears to be the condition of, or the moving consideration for, the gift, then the gift cannot take effect, if the adoption fails or is pronounced invalid: *Fanindra* v. *Rajeswar*, 12 I.A., 72=I.L.R., 11 C., 463; *Karamsi* v. *Karsan*, I.L.R., 23 B., 271.

KRITRIMA ADOPTION.

According to the Smritis and the commentaries, the Kritrima form differs from the Dattaka only in this, that in the latter the boy is given in adoption by his natural parents or either of them, whereas in the former, the consent of the boy only is necessary who should therefore be destitute of his parents, and thus *sui juris*, so as to be competent to give his assent to his adoption: in all other resdects there is no difference between the two forms.

But the so-called Kritrima adoption that is now prevalent in Mithilá appears to be a modern innovation and altogether a different institution from that dealt with in Hindu law.

The Kritrima form of adoption such as is now made in Mithilá, does not appear to be *affiliation* but is something like a contractual relationship between only the adopter and the adoptee.

In this modern form a man and his wife may either jointly adopt one son; or may each of them separately adopt a son, so that the son adopted by the husband does not become the wife's son, and *vice versa*; and in such a case the son of the one does not perform the exequial ceremony, nor succeed to the estate, of the other: *Sreenarain* v. *Bhya*, 2 Sel. Rep., 29 (23); see also 7 W.R., 500 and 8 W.R., 155.

The offer by the adoptive parent expressing his desire to adopt, and the consent to it by the boy, expressed in the lifetime of the former are sufficient to constitute adoption. No religious ceremonies or burnt sacrifices are necessary in this form: *Kullean* v. *Kripa*, 1 Sel. Rep., 11. There is no restric-

tion in this form as to the capacity of being adopted, such as being an only son, particular age, or performance of the Upanayana ceremony or marriage, and particular relationship: 3 Sel. Rep., 192=145 Old Edition.

The adoptee in this Kritrima form does not lose his *status* in his family of birth, and by the adoption he acquires the right of inheriting from the adoptive parents or parent alone. He cannot take the inheritance of his adopter's father or even of the adopter's wife or husband, the relationship being limited to the contracting parties only: 7 W.R., 500; 8 W.R., 155; 25 W.R., 255.

According to the authoritative commentaries of the Benares school the Kritrima form of adoption may be made in the Kali age, in addition to the Dattaka form, and it appears to prevail in many places in Northern India, if not also in the Deccan. But this form whenever met with at a place other than Mithilá, must not be confounded with the modern innovation of the latter district, which though called *Kritrima* is altogether different from it. The real Kritrima form is exactly similar to the Dattaka one as regards their incidents.

Properly speaking the name *Kritrima* should not be applied to the adopted sons that are popularly called by a different name in Mithilá, namely, *Kurta-putra* which does not appear to be a corruption of *Kritrima-puttra* but of *Krita-puttra*.

Mithilá is the modern district of Tirhoot which is a corruption of the word *Tira-bhukti* meaning the country "bounded by the banks" of three rivers, namely, the Gandak in the west, the Kosi in the East, and the Ganges in the South.

CHAPTER V.

MITÁKSHARÁ JOINT FAMILY.

ORIGINAL TEXTS.

१। भू-र्या पितामहोपात्ता निबन्धो द्रव्यम् एव वा।
तत्र स्वात् सदृशं स्वाम्यं पितुः पुत्रस्य चोभयोः॥

1. In land which was acquired by the grandfather also in a corrody or in chattels (acquired by him), the ownership of both father and son is similar.

२। मणिमुक्ताप्रवालानां सर्व्वस्यैव पिता प्रभुः।
स्थावरस्य समस्तस्य न पिता न पितामहः॥

2. The father is master even of all of gems, pearls and corals: but neither the father nor the grandfather is so, of the whole immoveable property.

३। स्थावरं द्विपदस्यैव यद्यपि स्वयम् अर्ज्जितं।
असम्भूय सुतान् सर्व्वान् न दानं न च विक्रयः॥
ये जाता येऽप्यजाताश्च ये च गर्भे व्यवस्थिताः।
वृत्तिं तेऽप्यभिकाङ्क्षन्ति वृत्तिलोपो विगर्हितः॥

3. Though immoveables and bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. Those that are born, and those that are yet unbegotten, and those that are still in the womb, all require the means of support: the dissipation of the hereditary source of maintenance is censured.

४। अविभक्ता विभक्ता वा सपिण्डाः स्थावरे समाः।
एकोऽनीशः सर्व्वत्र दानाधमन-विक्रये॥

4. Kinsmen joint or divided are equal in respect of immoveables; for, one is not competent to make a gift, mortgage or sale of the whole.

५। एकोऽपि स्थावरे कुर्य्याद्-दानाधमन-विक्रयम्।
आपत्काले कुटुम्बार्थे धर्म्मार्थे च विशेषतः॥

5. Even a single member may make a gift, mortgage or sale of immoveable property, at a time of distress, for the sake of the family, and specially for (necessary) religious purposes.

६ । अनेकपितृकाणान्तु पितृतो भागकल्पना ।

6. Among grandsons by different fathers, the allotment of shares is according to the fathers (i.e., *per stirpes*).

७ । शक्तस्यानीहमानस्य किञ्चिद्-दत्वा पृथक्-क्रिया ।

7. The separation of one who is able (to support himself), and is not desirous (of participation in the patrimony) may be completed by giving him a trifle.

८ विभक्तेषु सुतो जातः सवर्णायां विभागभाक् ।

8. A son born of a wife of equal class, after the (other) sons have been separated is entitled to the (parental) share.

९ । अनीशः पूर्व्वजः पित्रो-र्भ्रातु-र्भागे विभक्तजः ।

9. A son begotten before partition has no claim on the share of the parents; nor one, begotten after it, on that of a brother.

१० यदि कुर्य्यात् समानंशान् पत्नीः कार्य्याः समांशिकाः ।
न दत्तं स्त्रीधनं यासां भर्त्रा वा श्वशुरेण वा ॥

10. If he make the (sons') allotments equal, his wives to whom *Stridhanam* has not been given by the husband or the father-in-law, shall be made partakers of equal allotments.

११ । विभजेरन् सुताः पित्रो-रूर्द्धम् ऋक्थम् ऋणं समं ।

11. Let the sons divide equally the property and the debts after the demise of the parents.

१२ । पितुरूर्द्धं विभजतां माताप्यंशं समं हरेत् ।

12. The mother also, of those dividing after the death of the father, shall take an equal share.

१३ । असंस्कृतास्तु संस्कार्य्या भ्रातरः पूर्व्वसंस्कृतैः ।
भगिन्यश्च निजाद्-अंशाद्-दत्वांशन्तु तुरीयकं ॥

13. Uninitiated brothers should be initiated by those, for whom the ceremonies have been already completed; and sisters should be disposed of in marriage giving them as an allotment an one-fourth share.

१४ । पितृद्रव्याविरोधेन यदन्यत् स्वयम् अर्जितम् ।
मैत्रम् औद्वाहिकञ्चैव दायादानां न तद्-भवेत् ॥

क्रमाद् अभ्यागतं द्रव्यं हृतम् अभ्युद्धरेत् तु यः ।
दायादेभ्यो न तद्-दद्याद्-विद्यया लब्धम् एव च ॥

14. Without detriment to the father's estate, whatever else is acquired by a parcener himself, as a present from a friend, or a gift at nuptials, does not belong to the co-parceners. He who recovers hereditary property, which had been lost, shall not give it up to the parceners; nor what has been gained by science.

१५। पूर्वनष्टां तु यो भूमिम् एक-श्चेद् उद्धरेत् क्रमात् ।
यथा भागं लभन्त्येऽन्ये दत्वांशं तु तुरीयकं ॥

15. But if a single co-parcener recovers ancestral land which had been formerly lost, the rest may get the same according to their due shares, having set apart a fourth part for him.

१६। सामान्यार्थसमुत्थाने विभागस्तु समः स्मृतः

16. But if there be an accretion to the joint property (made by any parcener through agriculture, commerce, etc.), an equal division is ordained.

१७। पित्रभ्यां यस्य यद्-दत्तं तत् तस्यैव धनं भवेत् ।

17. Whatever has been given by the parents, belongs to him to whom it was given.

१८। पितरि प्रोषिते प्रेते व्यसनाभिप्लुतेऽथवा ।
पुत्र-पौत्रै ऋणं देयं निह्नवे साक्षिभावितं ॥
ऋक्थयाह ऋणं दाप्यो योषिद्-ग्राहस्तथैव च ।
पुत्रोऽनन्याश्रितद्रव्यः पुत्रहीनस्य ऋक्थिनः ॥
सुराकामद्यूतकृतं दण्डशुल्कावशिष्टकं ।
तथादानं तथैवेह पुत्रो दद्यान् न पैतृकं ॥

18. If the father is dead or gone to a distant place (and not heard of for twenty years), or laid up with an incurable disease, his sons and son's sons shall pay his debts which must be proved by witnesses in case of denial. He who takes the heritage, likewise he who takes the widow, or a son if the estate is not vested in any one else, or the heirs of one leaving no son, shall be compelled to pay the debts. A son is not liable for his father's debts incurred for indulgence in wine, women, or wager, or for unpaid fine or tax imposed on him, or for his promise to make an unlawful gift.

१९। भ्रातॄणां जीवतोः पित्रोः सहवासो विधीयते

19. For brothers a common abode is ordained so long as the parents are alive.